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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ASHLAND OIL, INC.,

Appellant,

—v.—

HERSCHEL H. ROSE, III,
State Tax Commissioner of West Virginia,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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February 9, 1987

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), holding the West Virginia wholesale gross receipts tax to be unconstitutional, precludes the imposition of that tax on the appellant which at the time of the *Armco* decision was directly challenging the imposition of such tax on appeal, without regard to whether the retroactivity criteria set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), are met.

2. If the decision in *Chevron* is found to apply, whether the retroactivity standards established in that case preclude the imposition of the West Virginia wholesale gross receipts tax at issue here.

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ON APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

Appellant, Ashland Oil, Inc., ("Ashland"), appeals from the final order of the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court") which reversed a judgment of the Circuit Court of Kanawha County, West Virginia ("Circuit Court"). The Circuit Court had granted Ashland's motion for summary judgment, holding that this Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), precluded the State of West Virginia from assessing and collecting from Ashland the West Virginia business and occupation tax on wholesale sales for its fiscal years ending September 30, 1975 and 1976.

A Designation of Corporate Relationships pertaining to Ashland is, pursuant to Rule 28.1, found at Appendix G.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court (Appendix A) has not been officially reported, but may be found at 350 S.E.2d 531 (W. Va. 1986). The order of the Circuit Court granting summary judgment (Appendix B) is not reported, and the administrative decision of the Tax Department of West Virginia is set forth in Appendix C.

JURISDICTION

The West Virginia Supreme Court rendered its opinion and entered a final order (Appendix D) on November 12, 1986, reversing the judgment of the Circuit Court, from which appeal to the West Virginia Supreme Court had been taken, and remanding the case to the Circuit Court for further proceedings. A Notice of Appeal (Appendix E) was filed in the West Virginia Supreme Court and the Circuit Court, to which the record had been returned, on January 20, 1987. The time within which to docket this appeal in this Court expires on February 10, 1987, and timely docketing has been made. Because the decision of the West Virginia Supreme Court upholds a state statute against a challenge under the United States Constitution, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause (art. I, § 8, cl. 3) of the United States Constitution.

West Virginia Code, §§ 11-13-1 (1971), 11-13-2 (1971), 11-13-2a (1971), 11-13-2b (1974), and 11-13-2c (1971), as in effect prior to April 13, 1985.

These constitutional and statutory provisions are reproduced in pertinent part as Appendix F.

STATEMENT OF THE CASE

Ashland, a corporation with substantial business activities in West Virginia, is a Kentucky corporation with its principal offices in Ashland, Kentucky. After an audit of its fiscal years ending September 30, 1975 and 1976, the State Tax Department of West Virginia issued a notice of assessment in the amount of $181,313.22 against Ashland for West Virginia wholesale business and occupation tax on certain of its wholesale sales for those years. Ashland resisted this assessment, and administrative hearings with respect to it before the Tax Department of West Virginia were held on several days in 1978. By administrative decision dated April 21, 1981, the Tax Department upheld the assessment of tax against Ashland. During May of 1981, Ashland appealed that administrative decision to the Circuit Court, and, following oral argument, on August 27, 1982 the case was submitted for decision. The parties, however, agreed with the Circuit Court that disposition of the case should await the decision of the West Virginia Supreme Court, and subsequently the decision of this Court, in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), *rev'g* 303 S.E.2d 706 (W. Va. 1983).

During the pendency of Ashland's case in the Circuit Court, the Circuit Court, the West Virginia Supreme Court and this Court all rendered decisions in the *Armco* case. In that case, Armco resisted assessment of the West Virginia business and occupation tax on wholesale sales for its taxable years 1970 through 1975 on the ground that the tax was unconstitutional because (i) as applied to Armco, it taxed transactions having an insufficient nexus with West Virginia, and (ii) it impermissibly discriminated against interstate commerce.

The Circuit Court sustained Armco's challenge on the ground that no substantial nexus existed between the state and Armco's wholesale sales. On appeal, the West Virginia Supreme Court reversed, holding (i) that because of Armco's unrelated business activities in West Virginia, a substantial

nexus between West Virginia and the sales transactions in question was not required to uphold the tax, and (ii) that Armco's claim that the statute discriminated against interstate commerce was without merit. On June 12, 1984 this Court reversed the West Virginia Supreme Court, holding that the West Virginia business and occupation tax on wholesale sales unconstitutionally discriminated against interstate commerce in violation of the Commerce Clause and was therefore invalid.

On October 31, 1984 Ashland moved in the Circuit Court for summary judgment on the basis of this Court's decision in the *Armco* case, claiming that the tax assessed impermissibly discriminated against interstate commerce. By order dated February 25, 1985, the Circuit Court granted that motion and reversed the assessment of West Virginia tax against Ashland. On appeal, however, the West Virginia Supreme Court reversed the Circuit Court, holding that, although the *Armco* decision was directly in point, the decision of this Court in the *Armco* case should apply only prospectively with respect to taxes accrued after the date of the decision by this Court in the *Armco* case. With respect to the scope of its holding, the West Virginia Supreme Court stated:

> We are mindful that the tax assessed against Ashland is not money that the State has collected and already spent, but rather a liability for tax asserted by the State. Our holding, however, affects all tax, both collected and assessed, on wholesale sales by out-of-state manufacturers.

Ashland Oil, Inc. v. Rose, 350 S.E.2d 531, 536 n.8 (W. Va. 1986).

Accordingly, the West Virginia Supreme Court reversed and remanded the case to the Circuit Court for resolution of Ashland's nexus argument.

FINALITY OF THE JUDGMENT BELOW

The jurisdiction of this Court to review decisions of the state courts is limited to decisions which constitute "final judgments or decrees." 28 U.S.C. § 1257. Although the court below remanded this case for "further proceedings not inconsistent with this opinion", 350 S.E.2d at 537, its decision nevertheless constitutes a final judgment or decree for purposes of 28 U.S.C. § 1257.

This Court has long accorded the finality requirement of 28 U.S.C. § 1257 a "practical rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This pragmatic approach has led in many cases to a finding of finality in state court decisions despite the fact that the state court remanded the case for further proceedings. A detailed review of such cases is contained in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-95 (1975), and two categories of cases discussed there lead to the conclusion that the judgment below should be deemed final.

The first relevant category of cases summarized in *Cox Broadcasting* includes those in which (i) reversal of the state court on the federal issue would be preclusive of any further litigation on the cause of action, and (ii) failure to consider the state court decision might erode federal policy. In the present case, the first requisite is clearly present. If Ashland succeeds on this appeal, no further issue will remain for litigation.

As to the federal policies commending a prompt hearing of this appeal, the failure of the highest court of a state to adhere to a constitutional decision of this Court, conceded to be directly in point, in a pending proceeding in the state courts presents an issue of overriding federal concern. Moreover, the issue of the applicability of this Court's resolutions of federal questions to other cases, as a matter of federal policy, has traditionally been determined by this Court. In the interest of avoiding prolonged and perhaps unnecessary litigation by tax-

payers in the courts of West Virginia, considerations of the orderly administration of justice suggest that the issue presented on this appeal should be resolved at the earliest appropriate occasion. Recognition of such concern led this Court to review a state court decision interpreting federal venue statutes, stating that "it serves the policy underlying the requirement of finality . . . to determine now in which state court appellants may be tried rather than to subject them . . . to long and complex litigation which may all be for naught if consideration of venue is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963). Precisely the same policy underlying the requirement of finality is presented here. *Accord Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (jurisdiction accepted to review validity of first amendment claim although a trial under a state "right of reply" statute remained to be heard); *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964) (jurisdiction accepted to determine validity of state fair trade act while suit for its enforcement was pending).

In appraising the relative priorities of federal policies dependent for protection on decisions of this Court, the applicability to taxpayers generally of a prior decision of this Court interpreting the Commerce Clause of the United States Constitution should command a significant ranking. Ashland submits, for example, that the federal policies which might be eroded here by lack of current review are imbued with a greater degree of federal significance than the federal venue statute involved in the *Mercantile* case. Accordingly, the decision of the West Virginia Supreme Court should be deemed final for purposes of 28 U.S.C. § 1257.

The second relevant category of cases summarized in *Cox Broadcasting* are those "in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. *See NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982) (jurisdiction accepted while a proceeding to determine damages was pending in the

state court); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980) (jurisdiction accepted although an appeal was pending in the state court); *Brady v. Maryland*, 373 U.S. 83 (1963) (jurisdiction accepted although a retrial relating to criminal punishment was pending in the state court); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945) (jurisdiction accepted although an accounting for profits remained to be conducted in the state court).

The West Virginia Supreme Court has remanded the present case to allow the Circuit Court to consider whether Ashland's wholesale sales had a sufficient nexus with the State of West Virginia. The issue presented by the present appeal will survive the remaining state court proceedings, unless one assumes that Ashland will be successful with respect to the nexus issue under the West Virginia nexus standards adopted by the West Virginia Supreme Court in the *Armco* case. Under those standards a finding of sufficient nexus here by the West Virginia courts verges on a foregone conclusion in light of the fact that Ashland, like Armco, conducts substantial business activities in West Virginia unrelated to the sales at issue.[1] Thus, if Ashland is forced to wend its way through the West Virginia courts once again preliminary to receiving this Court's review on the questions presented by this appeal, those questions will as a practical matter survive and require a decision by this Court after state court review is exhausted. And in terms of

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[1] Ashland has conceded that a substantial nexus exists between it (but not between the sales in question) and the State of West Virginia, *see* Appendix C at 25a, thus bringing Ashland squarely within the *Armco* decision of the West Virginia Supreme Court. In fact, the taxing authorities of West Virginia have announced that "[b]ecause the United States Supreme Court did not rule on the merits of Armco's nexus argument, the opinion of the West Virginia Supreme Court of Appeals on the nexus question continues to be the law of this State." State Tax Dep't of W. Va., Policy Statement at 3 (May 9, 1985). Accordingly, it is difficult to imagine how Ashland can be successful in pressing its nexus argument in the West Virginia courts, and this Court has often taken account of the likely outcome of state court proceedings. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Mills v. Alabama*, 384 U.S. 214 (1966); *Pope v. Atlantic C.L.R.R.*, 345 U.S. 379 (1953).

practical finality, one thing is certain: the highest court of West Virginia has said its final words on the applicability of the *Armco* case. Under these circumstances, the recent decision of the West Virginia Supreme Court should be considered a final judgment for purposes of 28 U.S.C. § 1257.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Before the Court on this appeal stands a taxpayer against which the State of West Virginia is affirmatively attempting to collect a tax imposed under a state statute found unconstitutional by this Court in June of 1984. Moreover, for some ten years Ashland has been resisting, in state administrative proceedings and in the courts of West Virginia, the imposition of this West Virginia wholesale gross receipts tax. The Circuit Court, in granting Ashland's motion for summary judgment, agreed that the *Armco* decision was dispositive of this case. The West Virginia Supreme Court, however, has refused to apply here this Court's ruling in *Armco*, despite its observation that the Circuit Court was "correct in concluding that the assessment against Ashland came within the holding of the United States Supreme Court in *Armco*." 350 S.E.2d at 534. This conclusion of the West Virginia Supreme Court presents legal questions which are substantial for two reasons.

First, the decision directly conflicts with the decisions of this Court in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and cases following it, including *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Bradley v. School Bd.*, 416 U.S. 696 (1974); *Thorpe v. Housing Auth.*, 393 U.S. 268 (1969); and *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). This line of cases generally requires that a newly-announced rule of civil law be applied, at a minimum, to all civil cases on direct review at the time the rule is announced.

The court below declined to follow these cases, instead applying an analysis similar to that adopted in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), an analysis properly

applicable only in situations not governed by the line of cases originating with *Schooner Peggy*. In doing so, the West Virginia Supreme Court ignored the norms of constitutional adjudication recently articulated by this Court in *Griffith v. Kentucky*, 55 U.S.L.W. 4089 (U.S. Jan. 13, 1987). And the net result is that Armco and Ashland, two taxpayers identically situated and pressing the same constitutional claim, are, for no rational reason, being treated to differing versions of the Constitution.

Second, even if it is concluded that the *Chevron* analysis applies to this case, the court below incorrectly applied its three-prong test, and thus has severely limited the impact of an important constitutional decision of this Court. Under the West Virginia Supreme Court's analysis, the State of West Virginia may not only refuse to grant timely claims for refund of the wholesale business and occupation tax, but may also (as in this case) invoke state process affirmatively to collect all such taxes which accrued before the decision in *Armco*. In fact, such affirmative collection proceedings are sanctioned by the court below against a taxpayer directly challenging the tax in question at the time of the *Armco* decision, a result not contemplated by the decision in *Chevron*.

I.

The Decision Below Directly Conflicts With The Line Of Cases Originating With *Schooner Peggy*.

In the West Virginia courts below, Ashland advanced the argument that this Court's decision in the *Armco* case should be applied to preclude the imposition of the West Virginia wholesale business and occupation tax on all taxpayers which, at the time the *Armco* decision was announced, were directly challenging the imposition of such tax. On brief Ashland stated:

> [E]ven in those rare instances where a particular decision is said to be prospective, the decision nevertheless applies to all *pending cases* whether at the trial level or on appeal.

> Thus, in any situation where a particular matter has not been finally adjudicated at the time the decision of the court is issued, such decision will be applied to all pending controversies involving the same issue.

Brief of Appellee at 13, *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986).

The court below rejected this contention, apparently on the ground that the rule asserted by Ashland should be applied only in criminal cases. 350 S.E.2d at 536 n.10. This conclusion is simply incorrect. A rule of civil law which is announced by this Court when another civil case is pending on direct review in a lower court must, at a minimum, be applied to the pending case, without regard to whether the newly-announced rule overruled clear past precedent or otherwise satisfied the tests set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). This rule originated in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801), in which Chief Justice Marshall stated that where, on appeal subsequent to a judgment, "a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 5 U.S. (1 Cranch) at 110[2]. And although *Schooner Peggy* was concerned with a change in the law made by treaty, a long series of cases demonstrates that the principle applies when a change in law is made by statute (*see, e.g., Bradley v. School Bd.*, 416 U.S. 696 (1974); *United States v. Alabama*, 362 U.S. 602 (1960) (per curiam); *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943); *Carpenter v. Wabash Ry.*, 309 U.S. 23 (1940)), by constitu-

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2 *Schooner Peggy* suggested that there may be an exception to this rule in "mere private cases between individuals." 5 U.S. (1 Cranch) at 110. This suggestion has led to a limited exception where application of the rule of *Schooner Peggy* would result in "manifest injustice." *See Thorpe v. Housing Auth.*, 393 U.S. 268, 282 (1969). This exception is inapplicabale here. This is not a case between mere private individuals, but is a case between a state and a taxpayer. Nor is it a case where application of the new rule will infirnge upon or affect or deprive a party of a right that had matured or become vested. *Compare Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), and *Bradley v. School Bd.*, 416 U.S. 696 (1974), *with Lemon v. Kurtzman*, 411 U.S. 192 (1973).

tional amendment (*see, e.g., United States v. Chambers*, 291 U.S. 217 (1934)), or by judicial decision (*see, e.g., Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Moores v. National Bank*, 104 U.S. 625 (1882)). And this Court has explicitly acknowledged that the rule of *Schooner Peggy* applies where the change in the law is "constitutional, statutory, or judicial." *Thorpe v. Housing Auth.*, 393 U.S. 268, 282 (1969).

The rule of the *Schooner Peggy* line of cases should apply here to preclude the State of West Virginia from collecting the taxes at issue. In the *Armco* case this Court struck down the West Virginia wholesale business and occupation tax on the ground that the tax unconstitutionally discriminated against interstate commerce. As a result of that ruling, the State of West Virginia was precluded from collecting additional business and occupation tax on wholesale sales assessed against Armco for the years 1970 through 1975. The State of West Virginia conceded as much in its Petition for Rehearing in the *Armco* case when it stated that "[w]e recognize that appellant Armco is entitled to the fruits of its victory. However, we submit that with the exception of Armco the Court's decision should be applied prospectively." Appellee's Petition for Rehearing at 3, *Armco Inc. v. Hardesty*, 467 U.S. 638, *reh. denied*, 469 U.S. 912 (1984).

At the time of the decision in *Armco*, Ashland's case was pending in the Circuit Court on direct review of an administrative decision adverse to Ashland. In the Circuit Court, Ashland was resisting an assessment of the West Virginia wholesale business and occupation tax on the ground that the tax was in violation of the Commerce Clause of the United States Constitution. The state, on the other hand, asserted that the tax was not constitutionally deficient. This Court affirmatively resolved the issue presented there, and the West Virginia courts were therefore compelled to follow this Court's mandate in Ashland's case and enter a decision in favor of Ashland under the rule of *Schooner Peggy*, without regard to whether the *Armco* decision represented a clear break with past precedent

or otherwise satisfied the requirements of *Chevron*. The Circuit Court did so by granting Ashland's motion for summary judgment. The court below, however, refused to follow suit, and by refusing to apply this rule to the present case, the court below committed error and unjustifiably expanded the reach of *Chevron*.[3]

Ashland submits that the adoption of a general rule which would result in the failure to apply a newly-declared rule of constitutional law to civil cases pending on direct review or, for that matter, cases which are otherwise non-final when the rule is announced, would be unfortunate. Such a general rule would require this Court to place itself in a position analogous to that of a legislature, would also frustrate the judicial objective of doing justice to each litigant on the merits of his own case, and, finally, would frustrate the goal of treating similarly situated litigants similarly.

This Court in criminal cases has experienced the substantial conceptual difficulties which can arise by not applying new rules retroactively to non-final cases, and has recently abandoned this approach in *Griffith v. Kentucky*, 57 U.S.L.W. 4089 (U.S. Jan. 13, 1987). The genesis of this change arose in the views of Justice Harlan expressed in *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in *Mackey* and dissenting from *Williams v. United States*, 401 U.S. 646 (1971)), and in *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting). Although *Griffith* involved a

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3 Ashland acknowledges that this Court has recently noted that questions of civil retroactivity "continue[ ] to be governed by the standard announced in *Chevron Oil Co. v. Huson*." *Griffith v. Kentucky*, 55 U.S.L.W. 4089, 4091 n.8 (U.S. Jan. 13, 1987); *United States v. Johnson*, 457 U.S. 537, 563 (1982). This statement should not be taken to mean, however, that *Chevron* completely displaces the *Schooner Peggy* line of cases. To the contrary, in *Johnson* the Court cited *Schooner Peggy* approvingly and even suggested that it was a model for the rule announced in that case. *See* 457 U.S. at 543. The statement should therefore be read as approving the continued viability of *Chevron* only in cases with respect to which *Chevron* theretofore applied—*i.e.*, cases which were not pending on direct review when a new rule was announced.

question of the retroactivity of criminal procedural rules, the considerations which compelled the conclusion reached in *Griffith* apply equally in the civil context. This Court in *Griffith* concluded that failure to apply a newly-declared rule to non-final cases violates basic norms of constitutional adjudication. The basic principle was said to be that:

> [I]t is a settled principle that this Court adjudicates only "cases" and "controversies". *See* U.S. Const. Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of the judicial review requires that we apply the rule to all similar cases pending on direct review.

55 U.S.L.W. at 4091.

This Court in *Griffith* was strengthened in its conclusion by the fact that "selective application of a new rule violates the principle of treating similarly situated defendants the same." *Id.* In addition, rejected in *Griffith* was the notion that a special rule of retroactivity should apply when the new rule is a "clear break" with the past because "the use of a 'clear break' exception creates the same problem of not treating similarly situated defendants the same." *Id.* at 4092. Thus, the heart of the holding in *Griffith* was that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past." *Id.*

The concerns which moved this Court to conclude that a new rule of criminal procedure must be applied to all non-final cases argue strongly against this Court's expansion of *Chevron* beyond its current application and against the contraction of the line of cases originating with *Schooner Peggy*. Justice Harlan suggested long ago that this Court should resist any

move in this direction in civil cases when, in a concurring opinion in *United States v. Estate of Donnelly*, 397 U.S. 286 (1970), he cautioned the Court about the "retroactivity quagmire" in which it had become "ensnared" in the criminal field, 397 U.S. at 295, and added:

> The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court. The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, see my *Desist* dissent, *supra*, so in the civil area that moment should be when the transaction is beyond challenge either because the statue of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life.

Id. at 295-96 (Harlan, J., concurring).

The suggestion by Justice Harlan that decisions of this Court in civil cases should apply uniformly unless a transaction is beyond challenge because the statute of limitations has run, or because the rights of the parties have been fixed by litigation and have become *res judicata*, has much to recommend it. First, such a rule would reconcile the doctrine of retroactivity in the civil and criminal areas where distinctions are difficult to justify. And perhaps equally important, it would avoid the retroactivity quagmire in civil litigation envisioned by Justice Harlan. These advantages, coupled with the simple justice of

treating similarly situated taxpayers similarly, strongly recommend plenary consideration of the questions presented on this appeal and reversal of the decision of the court below.

II.

The Retroactivity Standards Established In *Chevron* Have Been Met

The court below rested its decision on an analysis comparable to that applied by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Although Ashland believes that such an analysis is inapplicable to the present controversy for the reasons set forth above, even if *Chevron* were found controlling here, Ashland maintains that the tests set forth there compel the conclusion that *Armco* should control here.

Chevron established three relevant factors to be considered in determining whether a decision should be retroactively applied: first, as a threshold test, did the decision in question establish a new principle of law; second, will nonretroactivity retard or further operation of the rule in question; and finally, what are the relative equities of retroactive and nonretroactive operation. Ashland submits that the *Armco* decision did not establish any new principle of law, and that the court below has failed under the second and third factors to justify nonretroactivity.

A. The *Armco* Decision Did Not Establish A New Principle Of Law.

The threshold test for determining whether the *Armco* decision should be applied retroactively under *Chevron* is whether the *Armco* decision established a new principle of law. The controlling principle of constitutional law applied in the *Armco* decision is that a state may not discriminate against interstate commerce by subjecting it to a heavier tax burden than similar intrastate enterprises. That is a far cry from the establishment of a new principle of law. The *Armco* decision

simply applied the long-standing Commerce Clause principle prohibiting discrimination against interstate commerce.

According to *Chevron*, a decision will be found to have established a new principle of law if (i) it overruled clear past precedent on which the party urging prospective-only operation relied, or (ii) it decided an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 106. Neither of these tests is met here.

1. The *Armco* Decision Did Not Overrule Clear Past Precedent On Which West Virginia Relied

The fact of the matter is that the "clear past precedent" of which *Chevron* speaks was not overruled by the *Armco* decision. In 1948 the Supreme Court of Washington had this to say about a Washington gross receipts tax on wholesale sales identical in every important respect to the West Virginia tax involved here:

> [T]he statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in § 8370-6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington. The statute is therefore violative of the commerce clause of the Federal constitution, and is invalid.

Columbia Steel Co. v. State, 30 Wash. 2d 658, 664, 192 P.2d 976, 979 (1948).

And in 1964, referring to the same Washington gross receipts tax, three Justices of this Court observed:

> Prior to its amendment in 1950 the exemptive terms of this "multiple activities" provision were designed so that a Washington manufacturer-wholesaler would pay the manufacturing tax and be exempt from the wholesale tax. This provision, on its face, discriminated against interstate wholesale sales to Washington purchasers for it

> exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers.

General Motors Corp. v. Washington, 377 U.S. 436, 459 (1964) (Justice Goldberg, joined by Justices Stewart and White, dissenting).

Against this background the court below relied principally on the 1982 dismissal by this Court of the appeal in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). *Columbia Gas* arose under the West Virginia gross receipts tax on wholesale sales and involved a number of issues, among them a discrimination issue very similar to that involved in the *Armco* case. The dismissal of that appeal stands technically as a ruling on the merits. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The *Armco* decision therefore noted in effect that *Columbia Gas* was overruled on this discrimination issue. 467 U.S. at 643 n.7. The court below ruled that the *Chevron* test is satisfied because the *Armco* decision overruled a prior decision on which the State had relied. This conclusion suffers from two defects.

First, while the dismissal of *Columbia Gas* was indeed technically a precedent, this Court's "decision not to review fully the questions presented . . . is not entitled to the same deference given a ruling after briefing, argument, and a written opinion." *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979). Consequently, that dismissal could not justify as much reliance as a full opinion, particularly in light of the prior judicial observations regarding the same tax scheme in the State of Washington. Certainly this summary dismissal should not be considered the *clear* past precedent required under the threshold test of *Chevron*. Second, and more importantly, the suggestion that West Virginia relied upon the dismissal of *Columbia Gas* in 1982 rings hollow. The statute struck down in *Armco* had been in effect in West Virginia for more than 50 years. The idea that the State was lulled into reliance on a summary dismissal in *Columbia Gas* after 49 years of operation of the tax, nearly 35 of those years subsequent to *Columbia Steel*, is

simply not credible. The truth of the matter is that the dismissal in *Columbia Gas* had no effect at all on West Virginia's long-standing commitment to the statute found unconstitutional in *Armco*. While the *Armco* decision no doubt did extinguish any precedential value of *Columbia Gas* with respect to the discrimination issue, this should not be taken to meet the *Chevron* test requiring the overruling of clear past precedent on which West Virginia relied.

2. The *Armco* Decision Did Not Decide An Issue Of First Impression That Was Not Clearly Foreshadowed

Under *Chevron*, a decision may also be found to have established a new principle of law if it decides an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 106. Attempting to apply this alternative, the court below characterizes the *Armco* decision as "[d]eparting from the clear course of recent decisions on this issue." 350 S.E.2d at 533. Two examples are cited: first, this Court's conclusion in *Armco* that the tax on wholesale sales in West Virginia was not a compensating tax for that State's tax on manufacturing; and second, the application by this Court of a standard of internal consistency in testing the West Virginia tax at issue under the Commerce Clause. The fact of the matter is that in the case of both of these allegedly new rules, the *Armco* decision simply applied well-settled legal standards to the facts presented.

Whether one tax (the tax on wholesale sales) compensates for another tax (the tax on manufacturing) was not an "issue of first impression" within the meaning of *Chevron*. Quite to the contrary, decisions of this Court spanning many decades have dealt with precisely this issue. *See Maryland v. Louisiana*, 451 U.S. 725 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Alaska v. Arctic Maid*, 366 U.S. 199 (1961); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932). The *Armco* decision simply applied the standards developed in those cases to an analysis of the relationship between the

wholesale and manufacturing taxes in West Virginia. This application of traditional legal standards hardly rises to the dignity of resolving an issue of first impression. And even if one were to conclude that an issue of first impression was involved, it would be difficult to avoid the conclusion that its resolution was clearly foreshadowed by the decision in *Columbia Steel* and by the unequivocal observations of three Justices of this Court in the dissenting opinion in *General Motors*.

The second issue asserted to be one of first impression by the court below involves the application by this Court, in testing for discrimination against interstate commerce, of the requirement "that a tax must have 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." 467 U.S. at 644 (quoting from *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)). While the *Armco* decision may be the first to have applied the label "internal consistency" in the gross receipts tax area, the rule so labeled has been used for many years as a gross receipts tax test of discrimination under the Commerce Clause.

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), this Court considered the constitutionality of a Washington tax on the gross receipts from interstate commerce. In holding the tax to be in violation of the Commerce Clause, this Court observed:

> If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. Such a multiplication of state taxes, each mea-

> sured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove.

Id. at 439-40 (citations omitted).

Although not termed "internal consistency," this analysis from *Gwin, White & Prince* is precisely the internal consistency standard applied in the *Armco* decision. Thus, testing discrimination under the concept of internal consistency by asking what would result from the adoption by another state of a similar tax scheme is not in any respect, except the "internal consistency" label, a new rule. *See J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Moreover, a reading of the *Armco* decision's discussion of internal consistency reveals that this Court found the application of that concept to be entirely consistent with existing Commerce Clause principles. This confirms that the issue of discrimination presented by *Armco* was not an issue of first impression under the *Chevron* guidelines.

B. Even If The *Armco* Decision Were Found To Have Established A New Principle Of Law, Retroactive Application Would Be Required

If this Court were to find that the *Armco* decision established a new principle of law, thus satisfying the threshold test for nonretroactive application under *Chevron*, there remain two additional considerations to be weighed in determining whether the application of the *Armco* decision should be restricted: first, in view of the history of Commerce Clause jurisprudence defining the purpose of the prohibition against discrimination, whether nonretroactive application would retard or further that purpose; and second, whether equity favors retroactive or nonretroactive application. The results of those tests in this case call for the retroactive application of the *Armco* decision.

1. Nonretroactive Application Of The *Armco* Decision Would Retard Rather Than Further The Purpose Of The Commerce Clause

First, in terms of the purpose of the Commerce Clause, if judicial decisions invalidating state taxes that discriminate against interstate commerce were to be applied prospectively only, the practical effect would verge upon abandonment of the rule against discrimination. Each state would be free to enact tax laws without concern for constitutional limitations, confident that, if a law were ultimately found to discriminate against interstate commerce, no harm would have been done. In the interim, which as a practical matter could be a considerable period (here some 50 years), the state would have had the financial benefits of the revenues collected under the unconstitutional law. In this very real sense, the prospective application of a finding of unconstitutionality retards the purpose of the Commerce Clause by offering the inducement of a clear financial advantage to those states which violate it.

The second reason why nonretroactive application would retard the purpose of the Commerce Clause lies in the reasonable expectations of those engaged in interstate commerce that the Commerce Clause stands as a barrier against the collection of unconstitutional taxes. Commercial confidence in the enforcement of fundamental constitutional protections would be shaken by a ruling in this case that the state may continue to assess and collect the unconstitutional tax because the finding of unconstitutionality is to be prospective only. To the extent that the successful functioning of our intricate commercial system rests ultimately on confidence and trust in our Constitution and laws, a nonretroactive application of the *Armco* decision would tend to erode that confidence and so retard the purposes of the Commerce Clause.

2. Equitable Considerations Dictate Retroactive Application Of The *Armco* Decision.

The second balancing test under *Chevron* requires a comparison between the equities of permitting the State affirmatively to invoke its process to collect constitutionally defective taxes and the equities of permitting taxpayers to resist the imposition of such discriminatory taxes. Such a comparison in this case favors retroactive application of the *Armco* decision.

If blame is to be assessed as between the State of West Virginia and its taxpayers, it is the State which must accept full responsibility for its current predicament. The State for many years imposed a tax which was discriminatory on its face, in spite of the clear warnings in *Columbia Steel* and *General Motors* that the West Virginia scheme was constitutionally defective. By ignoring those warnings, the State assumed the risk that eventually its taxing statute would be struck down. Moreover, ignoring those warnings was a gamble which paid off handsomely for the State. Over the 50 years that West Virginia employed its discriminatory scheme (the bulk of those years subsequent to the *Columbia Steel* decision in 1948) the State has collected millions of dollars in unlawful taxes. The recovery of most of this windfall is now presumably barred by the applicable statute of limitations.[4]

The effect of the decision below is to expand that windfall by allowing the State not only to retain all taxes already collected, even though timely refund procedures are available, but also affirmatively to collect all taxes accrued on or before

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4 The court below relied on *Lemon v. Kurtzman*, 411 U.S. 192 (1973). At issue in *Lemon* was whether a state agency would be permitted to reimburse parochial schools for past services performed under a state program which was subsequently determined to be at odds with the Constitution. This Court, after considering and weighing the nature of the parties' rights and the potential impact on those rights which would result from a refusal to allow reimbursement, concluded reimbursemet was permissible. *Lemon* directly supports Ashland's contention in this case by indicating that equtiy will not permit a state to profit at the out-of-pocket expense of other parties who bear no responsibility for the unconstitutional law.

the date of the *Armco* decision in this Court. That result is hardly equitable. The State will realize no "loss" if this extraordinary grace is not granted to it. The amounts at issue here are funds to which the State is not entitled, and every consideration of equity weighs against permitting the State to shift to innocent taxpayers the loss from the risk of invalidity which the State undertook.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Dated: February 9, 1987

Respectfully submitted,

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APPENDIX

Appendix A

OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 16962

ASHLAND OIL, INC.

v.

HERSCHEL H. ROSE, III,
STATE TAX COMMISSIONER

Kanawha County Reversed.

Brotherton, *Justice*

1. The decision of the United States Supreme Court in *Armco, Inc. v. Hardesty* invalidated the West Virginia Business and Occupation Tax on wholesale sales by out-of-state manufacturers. 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984).

2. "In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retro-

active effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of law in their overruling decisions." Syl. pt. 5, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979).

Brotherton, *Justice*:

This is a West Virginia Business & Occupation Tax case in which the parties dispute the scope of application of the United States Supreme Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984). The State Tax Commissioner appeals from a summary judgment granted by Judge Workman of the Kanawha County Circuit Court, which held that business and occupation tax assessed on Ashland Oil, Inc.'s wholesale sales was invalid under *Armco*. We agree with the circuit court that the *Armco* decision applies to the facts of this case. We nevertheless reverse the summary judgment, because in our opinion the holding in *Armco* should be applied prospectively only.

The appellee, Ashland, is a Kentucky corporation qualified to do business in West Virginia. It is an integrated oil company engaged in a wide variety of business enterprises. Pursuant to an agreement between a previous tax commissioner and Ashland, the State Tax Department conducted a detailed audit of Ashland's fiscal years ending September, 1975 and September, 1976. The audit resulted in a deficiency assessment in the amount of $181,313.22 for business and occupation tax on wholesale sales with West Virginia destinations. Ashland filed a petition for reassessment and objected to the proposed adjustments. The Commissioner upheld the assessment of tax in an

administrative decision dated April 21, 1981.[1] Ashland filed a timely appeal to the Circuit Court of Kanawha County.

At the administrative level, and also in briefs filed in the circuit court, the controversy focused on whether various sales operations of Ashland had sufficient nexus with the State of West Virginia to support the imposition of the business and occupation tax. The Commissioner concluded in his administrative decision that the contacts of the corporation as a whole were sufficient to support the imposition of tax on all sales having West Virginia destinations. Ashland, however, contended throughout the proceedings that sales by separate marketing units should be evaluated separately for nexus with the state. Prior to resolution of this issue in the circuit court, the United States Supreme Court decided *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), and the circuit court granted Ashland summary judgment on that basis.

I.

Armco, like Ashland Oil, was a diversified corporation embroiled in a dispute with the State Tax Department over the ability of the State of West Virginia to impose business and occupation tax on certain of its wholesale sales to West Virginia customers. This Court reversed a decision of the Circuit Court of Kanawha County, and reinstated an assessment of tax against Armco, holding: (1) Armco was a unitary business with a substantial nexus to West Virginia, and it was not necessary to consider each division of the corporation separately to determine whether tax could be imposed; (2) there was a rational relationship of the tax to the local services and benefits afforded by the State of West Virginia to Armco, and the tax was fairly apportioned; (3) West Virginia's tax on wholesale

1 The administrative decision refers to adjustments in the retail sales classification for 1975, as well as in the wholesale classification for both the audited years. To the extent that the assessment relates to retail sales, it falls outside the scope of the *Armco* decision, and accordingly is not addressed here.

sales, from which in-state manufacturers were exempt, did not discriminate against out-of-state manufacturers in violation of the commerce clause, because in-state manufacturers paid a higher tax on gross proceeds from manufacturing; and (4) the tax did not violate the "equal and uniform" clause of the West Virginia Constitution. *Armco, Inc. v. Hardesty*, ____ W.Va. ____, 303 S.E.2d 706 (1983).

In an opinion delivered by Justice Powell, the United States Supreme Court reversed that decision, and held that the West Virginia Business and Occupation Tax on wholesale sales unconstitutionally discriminated against interstate commerce, because taxpayers who manufactured their products in West Virginia were exempt from the tax. *Armco, Inc. v. Hardesty*, 467 U.S. at 639.[2]

The Commerce Clause prohibits a state from discriminating between transactions because of some interstate element. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). The Supreme Court in *Armco* found our tax scheme discriminatory on its face, because it taxed certain transactions (wholesale sales) more heavily when they crossed state lines than when they occurred within West Virginia. 467 U.S. at 642. The Court refuted this Court's reasoning that out-of-state manufacturers suffered no actual discrimination, saying that the manufacturing tax could not be deemed a "compensating tax" for the wholesale tax on out-of-state businesses, both because manufacturing and wholesaling are not "substantially equivalent events," and because the statute did not provide for any reduction of the manufacturing tax when goods manufactured in West Virginia were sold out-of-state. 467 U.S. at 643-44. Departing from the clear course of recent decisions on this issue, *see, e.g., Com-*

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2 W.Va. Code § 11-13-2c (1983) imposes a tax of 0.27% on gross income of a person engaged in the business of selling at wholesale. At the time *Armco* was decided, and during the audit period in this case, W.Va. Code § 11-13-2 (1974) included an exception from the wholesale tax for manufacturers and producers of natural resources within West Virginia who sold their products at wholesale in West Virginia. The exception for in-state manufacturers was removed effective April 13, 1985. *See* W.Va. Code § 11-13-2 (Supp. 1986).

plete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 & n.8, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), the Court said that no actual discriminatory impact was required to establish a Commerce Clause violation. It applied instead the "internal consistency" standard previously used to assess the validity of state net income taxes: "[T]he tax must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade." 467 U.S. at 644, *quoting Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983). Prior to *Armco*, this test had been used only in net income tax cases, where net income must be apportioned among the states in which the taxpayer does business. In gross receipts tax cases apportionment has not been considered necessary, because the source of receipts can be determined directly.[3]

In this case, the Tax Commissioner asserts that the exemption for in-state wholesalers was struck down in the *Armco* decision and not the wholesale tax on out-of-state manufacturers. The taxpayer argues to the contrary, and the text of the *Armco* opinion supports the taxpayer's position. The opening paragraph of the Supreme Court's opinion reads:

> In this appeal an Ohio corporation claims that West Virginia's wholesale gross receipts tax, from which local manufacturers are exempt, unconstitutionally discriminates against interstate commerce. We agree and reverse the state court's judgment upholding the tax.

467 U.S. at 639. As pointed out by counsel for the taxpayer, if the exemption and not the wholesale tax had been struck down, it would not have been necessary to reverse the judgment upholding the wholesale tax.

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3 We do not rule out the possibility that apportionment may be the only equitable way to resolve the problem of imposing a gross receipts tax on activities that occur partly within and partly outside the taxing state. For an article suggesting this approach, see Judson & Duffy, *An Opportunity Missed*: Armco, Inc. v. Hardesty, *A Retreat from Economic Reality in Analysis of State Taxes*, 87 W.Va.L.Rev. 723 (1985).

Armco did, then, strike down the tax on wholesale sales, at least as applied to out-of-state manufacturers.[4] The State Tax Commissioner does not dispute that Ashland is an out-of-state manufacturer selling at wholesale within West Virginia. The circuit court was, therefore, correct in concluding that the assessment against Ashland came within the holding of the United States Supreme Court in *Armco*.

II.

The Commissioner's second line of defense is that the *Armco* decision should be applied prospectively only, *i.e.*, only from the date of decision, June 12, 1984, forward. The Commissioner filed a petition for rehearing with the United States Supreme Court on this basis, and the petition was denied. Resolution of the retroactivity issue is, therefore, left to this Court.[5]

Although statutes normally operate prospectively only, judicial decisions ordinarily operate retroactively. The courts of this country long have recognized exceptions to the rule of retroactivity, however. *See, e.g., Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall) 175 (1863). In syllabus point 5 of *Bradley v. Appalachian Power*

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4 Then State Tax Commissioner Rose recognized as much in a memorandum issued July 20, 1984, one month after the *Armco* decision. The memorandum included the following explanation:

> An out-of-state manufacturer of tangible personal property who sells the same at wholesale (as defined in W.Va. Code § 11-13-1) in this State will be exempt from business and occupation tax under the wholesale classification on the gross proceeds from such sales. The out-of-state manufacturer will continue to be taxable under other classifications of the business and occupation tax just like West Virigina manufacturers.

5 In a similar case, the Supreme Court recently indicated that tax refund issues, or issues concerning the remedy for imposition of an unconstitutional tax, are frequently intertwined with state law and may be better resolved at the state level. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

Co., 163 W.Va. 332, 256 S.E.2d 879 (1979), this Court set out five criteria for prospective application of judicial decisions in civil cases:

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of law in their overruling decisions.

See also Ables v. Mooney, 164 W.Va. 19, 264 S.E.2d 424 (1979).[6]

To apply the *Bradley* factors to this case, in order: First, the substantive issue in *Armco* was state taxation, a traditionally settled area of law, set out in a statute on which taxpayers and their advisors, as well as the State of West Virginia, relied.[7]

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6 These criteria follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), and later cases.

7 A noted commentator observed: "[Decisions applied prospectively] have a common objective, to rid the law of an unsound rule and at the

Neither was the new rule clearly foreshadowed. As noted above, the rule used to invalidate the tax in *Armco* was an unexpected retreat from the actual economic impact standard of *Complete Auto* and its progeny. *See, e.g.*, Judson & Duffy, *An Opportunity Missed*: Armco, Inc. v. Hardesty, *A Retreat from Economic Reality in Analysis of State Taxes*, 87 W.Va.L.Rev. 723, 723 (1985); Lathrop, Armco—*A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause*, 63 Taxes 551, 557-61 (1985). Further, the issue of the constitutionality of the wholesale tax was presented to the Supreme Court in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807, 103 S.Ct. 32, 74 L.Ed.2d 46 (1982), and the Court dismissed the appeal for want of a substantial federal question. This amounts to a ruling on the merits, *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), and Justice Powell acknowledged as much in a footnote to the *Armco* opinion. 467 U.S. at 643-44 n.7. Second, the wholesale tax provision was a substantive, rather than a procedural, rule. Third, it was not a common law decision that was overruled, but a statute that had been enforced since 1935. Its overruling therefore had a widespread impact, the full ramifications of which have yet to be explored in this and other cases. Fourth, the *Armco* decision was a constitutional interpretation that, as discussed above, represented a clear departure from prior precedent. Fifth, previous law required payment of the wholesale tax, and the Supreme Court validated the tax by refusing the Columbia Gas appeal for want of a substantial federal question. *Armco* reversed that precedent by invalidating the tax as applied to out-of-state manufacturers.

All of these factors militate in favor of prospective application of the *Armco* rule. Moreover, our research indicates that

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same time preclude undue hardship to a party that has justifiably relied on it. Reliance plays its heaviest role in such areas as property, contracts, and taxation, where lawyers advise clients extensively in their planning on the basis of existing precedents." Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533, 543 (1977).

other courts often have used prospective application to protect the reliance of state and local officials on money collected or assessed under presumptively valid statutes later declared unconstitutional.

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (*Lemon I*), the Supreme Court struck down Pennsylvania's statutory program for reimbursing nonpublic sectarian schools for secular education services, because it fostered an excessive entanglement of church schools and the State of Pennsylvania. In *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) (*Lemon II*), the Court reviewed and affirmed a district court order that permitted Pennsylvania to reimburse the schools pursuant to the statute held unconstitutional for services performed prior to the date of its decision in *Lemon I*.

> The process of reconciling the constitutional interests reflected in a new rule of law with the reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal. . . .": Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set principle of absolute retroactive invalidity but depends upon a consideration of particular relations . . . and particular conduct . . . of rights claimed to have been vested, of status, of prior determinations deemed to have finality; and of public policy in the light of the nature both of the statute and of its previous application."

411 U.S. at 198-99 (citations omitted). The Court acknowledged that implementation of the district court's order might to some extent offend the first amendment values on which its decision in *Lemon I* was based, but concluded that "the remote possibility of constitutional harm from allowing the State to keep its bargain" was offset by the expenses incurred by schools in reliance on promised payments for expenses incurred by them prior to the *Lemon I* decision. "It is well established that reliance interests weigh heavily in the shaping

of an appropriate equitable remedy." 411 U.S. at 203. The majority saw its ruling as giving appropriate deference to federalism, noting the "general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." 411 U.S. at 208-09. Thus the Supreme Court applied its holding in *Lemon I* prospectively from the date of decision primarily to protect the financial reliance of the Pennsylvania schools affected. Although *Lemon II* is not a tax refund case and does not therefore provide direct and conclusive authority in this case, it provides the basis for applying the retroactivity analysis in the context of protecting state fiscal interests. *See also Cipriano v. Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (decision holding unconstitutional Louisiana's property-taxpayer limitation on franchise applied prospectively because retroactivity would impose significant hardship on cities, bondholders, etc.)

Numerous state courts have denied state tax refunds in cases where a tax was found unconstitutional. Chief among them is *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983). In that case, the Supreme Court of New Jersey found that state's Emergency Transportation Tax ("ETT") unconstitutional as in violation of the privileges and immunities clause of the Constitution, because it taxed New York residents at a higher effective rate on their New Jersey income than it taxed New Jersey residents. After so holding, the court not only made the decision prospective, but delayed the effective date of its holding until January 1 of the succeeding year, in order to allow state officials sufficient time to compensate for the loss of revenue.[8] 93 N.J. at 467-68, 461 A.2d at 1111.[9]

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8 We are mindful that the tax assessed against Ashland is not money that the State has collected and already spent, but rather a liability for tax asserted by the State. Our holding, however, affects all tax, both collected and assessed, on wholesale sales by out-of-state manufacturers.

9 Other cases refusing refunds when declaring a state or local tax invalid include *Metropolitan Life Ins. Co. v. Comm'r*, 373 N.W.2d 399

Given that the *Armco* decision represented a reversal of prior precedent, and that retroactive application of the *Armco* rule would cause severe hardship, estimated at $50 million in tax refunds if applied retroactively, we choose to apply the ruling prospectively from the date of decision, June 12, 1984.[10] This means that there was no business and occupation tax on wholesale sales by out-of-state manufacturers made between June 12, 1984, and the date the statute was amended to remove the exemption for West Virginia manufacturers.

Although Ashland asserts that it raised the commerce clause argument from the beginning, it is clear from the record that the real dispute in this case has been nexus. Neither the Supreme Court's decision in *Armco* nor our decision today impairs Ashland's ability to litigate that issue and have its rights determined in the circuit court. Any benefit from the *Armco* decision would have been a windfall to Ashland. We believe, therefore, that the reliance of the State of West Virginia on a presumptively valid tax outweighs any injury that may be sustained by Ashland on account of our holding of prospectivity.

(N.D. 1985); *Bond v. Burrows*, 103 Wash.2d 153, 164, 690 P.2d 1168, 1174 (1984); *Jacobs v. Lexington-Fayette Urban County Gov't*, 560 S.W.2d 10 (Ky. 1977); *Pellnat v. City of Buffalo*, 59 A.D.2d 1038, 399 N.Y.S.2d 788 (1977); *Hurd v. City of Buffalo*, 41 A.D.2d 402, 343 N.Y.S.2d 950 (1973), *aff'd*, 34 N.Y.2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974); *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973); *Southern Pacific Co. v. Cochise County*, 92 Ariz. 395, 406, 377 P.2d 770, 778 (1963).

10 In a purely prospective ruling, even the party who successfully litigates the issue does not benefit from the new rule. *See, e.g., Salorio v. Glaser, supra.* Traynor, *Quo Vadis, Prospective Overruling*, 28 Hastings L.J. at 546-47. If the *Armco* case were before us, we would have the opportunity to make such a ruling. The issue with respect to *Armco* is res judicata, however, and not subject to collateral attack. Also, we do not consider the application of prospectivity in criminal rights cases such as *People v. Boyd*, 38 Cal.3d 762, 215 Cal.Rptr. 1, 700 P.2d 782 (1985), dispositive in a civil setting. Where a decision of unconstitutionality affects the life or liberty of a convicted criminal, the Supreme Court has extended the rules of prospective operation to include pending cases, while limiting retroactivity in order not to disturb final judgments. Such considerations are not present in civil cases, and a strict rule of prospectivity may therefore be applied.

We, therefore, reverse the summary judgment and remand this case to the circuit court for further proceedings consistent with this opinion.

Reversed.

Appendix B

ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

At a Circuit Court For Kanawha County held at the Court House thereof on the 25th day of February 1985.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Civil Action No. CA-81-2010

ASHLAND OIL, INC.,

Petitioner,

v.

HERSCHEL H. ROSE, III,
State Tax Commissioner,

Respondent.

ORDER

This cause having come on to be heard on motion of petitioner for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure for Trial Courts of Record and the court having considered the pleadings in the action, the record made before the State Tax Commissioner, the briefs submitted by the parties and having heard oral argument and having found that there is no genuine issue of fact to be submitted to the trial court and having concluded that petitioner is entitled to summary judgment as a matter of law, it is hereby

ORDERED, that petitioner's motion for summary judgment is in all respects granted, and it is further

ORDERED, ADJUDGED AND DECREED that the ruling of the State Tax Commissioner appealed from is reversed and the assessment of additional business and occupation taxes against the petitioner for the period October 1, 1974 through September 30, 1976 (FYE September 30, 1975 and September 30, 1976) is null and void and held for naught.

Dated February 25, 1985

ENTER:

/s/ Margaret Workman
Judge Margaret Workman

Prepared by:

/s/ Larry A. Carver

LARRY A. CARVER
STATE TAX COUNSEL
ASHLAND OIL, INC.
P.O. Box 391
Ashland, Kentucky 41101

/s/ Susan C. Wittemeier

SUSAN C. WITTEMEIER
COUNSEL FOR ASHLAND OIL, INC.
GOODWIN & GOODWIN
1717 Charleston National Plaza
Charleston, West Virginia 25301

Inspected by:
/s/ Gregory A. Morgan

GREGORY A. MORGAN
ASSISTANT ATTORNEY GENERAL
TAX DIVISION
435 West Wing
State Capitol Building
Charleston, West Virginia 25305

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.

I, Phyllis J. Rutledge, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and seal of said Court this 9th day of December 1986.

/s/ Phyllis J. Rutledge,

Clerk, Circuit Court,
KANAWHA COUNTY, WEST VIRGINIA

Appendix C

ADMINISTRATIVE DECISION OF THE TAX DEPARTMENT OF WEST VIRGINIA

[SEAL]

State Tax Department of West Virginia
Charleston 25305

BEFORE THE TAX COMMISSIONER
OF THE STATE OF WEST VIRGINIA

BUSINESS TAX DIVISION

DOCKET #78-038 B

File No. 61 012 2250 001

In the Matter of the Petition of

ASHLAND OIL, INC.
1409 Winchester Avenue
Box 391
Ashland, Kentucky 41101

PRESIDING HEARING EXAMINER:
John L. Millar

PETITIONER REPRESENTED BY:
Larry A. Carver, Director State Tax Law
Donald R. Wheeler, Tax Attorney
Jerry Colvin, Supervisor
State Income Tax
David L. Campbell, Legal Intern

BUSINESS TAX DIVISION REPRESENTED BY:
Douglas Kilmer, Staff Attorney
Dale W. Steager, Director, Legal Division
Nick Ciccarello, Supervisor
Auditing Section
Martha Price, Accountant
Auditing Section

DATE, TIME AND PLACE OF HEARINGS:
June 12, 1978 9:30 A.M.
July 20, 1978 9:30 A.M.
August 24, 1978 9:30 A.M.
October 12, 1978 9:30 A.M.
State Tax Department
Office of Hearings and Appeals
1217 Quarrier Street
Charleston, West Virginia 25301

ADMINISTRATIVE DECISION

An assessment for business and occupation tax was issued against Ashland Oil, Inc. (herein also referred to as the Petitioner or Ashland) on December 12, 1977 by Jon H. Snyder, Director of the Business Tax Division, pursuant to the lawful authorization of David C. Hardesty, Jr., then State Tax Commissioner, under the provisions of Chapter 11, Article 13 of the West Virginia Code. This assessment was for the fiscal years ending September 30, 1975 and September 30, 1976 for tax of $181,313.22 and penalty of $34,141.67, for a total assessed liability of $215,454.89.

The Petitioner timely filed a petition for reassessment. The matter was regularly set for hearing, and the Petitioner was served with notice of the hearing.

John L. Millar, a Hearing Examiner designated to hear the matter, determined that all proper notices and documents required by law had been timely filed and called the matter on to be heard at 9:30 A.M. EDT, on the 12th day of June, 1978, in the State Tax Department at Charleston, West Virginia. Three subsequent hearings were held in this matter on July 20, 1978, August 24, 1978, and October 12, 1978.

FACTS

Ashland Oil, Inc. is an integrated oil company engaged in a wide variety of business enterprises. Ashland is one of the nation's largest independent refiners and is a leading supplier of petroleum products to independent marketers in the industry. In addition, the Petitioner explores for and produces oil worldwide and gas in North America. Ashland manufactures and markets many chemical and petrochemical products and purchases chemicals for resale from other companies. It constructs and paves highways and streets as well as supplying the aggregates and other construction materials. Ashland has become a substantial coal producer and marketer since entering the field in 1969. It also operates extensive transportation facilities in connection with its petroleum, chemical and aggregate operations and as a contract carrier. In furtherance of its varied business enterprises, Ashland has acquired numerous locations worldwide, including West Virginia. In West Virginia, Ashland has plants, storage facilities, transportation facilities, retail gasoline stations, oil and natural gas production facilities, and retail and wholesale outlets for marketing various products. Sales into West Virginia are made from inventories located both within and outside this State. Ashland reported and paid business and occupation tax during the two audited years on gross income in excess of one hundred seventy-five million dollars. The Petitioner took industrial expansion credit on its fiscal year 1976 return in excess of one hundred ninety-six thousand dollars.

At the time of the resolution of a previous audit of Ashland, a meeting was held between representatives of Ashland and then Tax Commissioner Dailey, at which time it was agreed between the parties that a more complete, detailed audit would be conducted by the State. The purpose of this detailed audit was to enable the State and the Petitioner to prepare a proper case to litigate and decide many outstanding issues. This agreement was confirmed by Commissioners Goodwin and Hardesty, who served subsequently to Commissioner Dailey. At

a meeting with Commissioner Hardesty, the parties further agreed, insofar as possible, to handle the case by stipulation because of the complexity of Ashland's operations in West Virginia and the great number of witnesses that would be required to attend the hearings. It was the opinion of the parties that both time and expenses could be reduced by utilization of such stipulations.

A detailed audit was subsequently performed by the Business Tax Division, which disclosed various reporting errors under the production, manufacturing, retail, wholesale, service, and rents and royalties classifications. In several minor instances the auditor found that Ashland had overstated its income. The major reason for the assessed deficiency, however, was Ashland's failure to report its entire gross income derived from retail and wholesale sales made in West Virginia. The auditor utilized a test period of December, 1975 and April and August, 1976 to develop a percentage of sales with West Virginia destinations where the products sold were picked up by the customer outside West Virginia. Such transactions were not included as taxable sales in the audit. All other direct sales were included in the measure of tax.

At the time period of the audit, Ashland Oil, Inc. consisted of five major companies: Ashland Petroleum Company, Ashland Chemical Company, Ashland Construction Company, Ashland Exploration Company and Ashland Oil Canada. These companies were, in turn, comprised of more than thirty different operating divisions. While the record does not disclose how many divisions actually do business in West Virginia, Ashland protested the assessment only as to sales made by nine of these divisions—five in the Petroleum Company and four in the Chemical Company.

Following the issuance of the assessment, Ashland timely filed a petition for reassessment and objected to the adjustments made under the retail classification for fiscal year ending September, 1975 and under the wholesale sales classification for both fiscal years included in the audit. Ashland did not object to the other audit findings but did request waiver of the assessed penalties.

Counsel for the Business Tax Division and Ashland Oil, Inc. entered into nine separate stipulations covering the factual situations pertaining to the sales in questions. Brief oral testimony and the introduction of these stipulations were made at four administrative hearings conducted by the Office of Hearings and Appeals.

The marketing operations of the nine divisions in question are carried out in a diverse manner. The following factors were identified by the parties as part of Ashland's marketing activities in West Virginia: local advertising, solicitation of orders, delivery by company-owned vehicles, providing technical advisors and marketing assistance, inventory and offices. In addition, a number of sales resulted through the transportation facility Ashland maintains at Kenova, West Virginia. To determine the specific manner in which sales were made in West Virginia by the individual divisions, Ashland formulated and utilized the term "Separately Identifiable Marketing Operation" ("SIMO") throughout the stipulations. A SIMO is defined in the stipulations "as being a unit of Taxpayer's operations having its own personnel and customers, which functions independently of and apart from other marketing units in the state". Joint Exhibit No. 1. For the nine divisions, Ashland identified seventeen marketing units, or SIMO's, each with a manager. While some divisions were analyzed by one SIMO, others were analyzed by two SIMOs. Ashland then further compartmentalized the seventeen SIMOs into thirty-three factual situations, to reflect the various ways sales were made within each SIMO. The various marketing factors (solicitation, inventory, etc.) described above were considered for each factual situation or compartment. In addition, Ashland also considered the factor of whether a salesman had the authority to accept orders; in no instance was such authority granted.

Sales made by Allied Oil Company may [be] used as an example to demonstrate the SIMO-compartment analysis prepared by Ashland. Allied Oil is a division of Ashland Petroleum Company, one of the five major companies of Ashland Oil, Inc. Allied Oil markets No.'s 2, 4 and 6 industrial fuel oil

through two SIMOs. The first SIMO pertains to Allied's national account sales marketing operation, and the second SIMO pertains to its regional account operation. The national account sales operation was created to be responsible for accounts with major purchasers on a centralized basis. Ashland prepared an analysis of the national account sales through four exhibits, each representing a different compartment or situation. In situation one (Exhibit A-1), Ashland noted no contacts were made in West Virginia for sales of fuel oil No.'s 2 and 6. In situation two (Exhibit A-2), Ashland noted only solicitation occurred in West Virginia for sales of fuel oil No.'s 2, 4 and 6. In situation three (Exhibit A-3), Ashland noted only an inventory was maintained in West Virginia from which sales of fuel oil No. 6 were delivered. Finally, in situation four (Exhibit A-4), Ashland noted that the only contact in West Virginia was movement of fuel oil No. 2 through its Kenova terminal to common carriers. Although in both situations two and three sales were made to Weirton Steel, an in-state customer, Ashland considered these sales different because, in the first instance, only solicitation occurred and, in the second instance, fuel was delivered from Ashland's facility at Follansbee, West Virginia. Ashland further noted that the only reason solicitation occurred in West Virginia in the first instance was because the home office of Weirton Steel is located in West Virginia. In its initial brief filed subsequent to the hearings, Ashland conceded that sales made in situation three were subject to business and occupation tax but contested the sales made in the remaining situations.

The second SIMO of Allied Oil described by Ashland pertains to certain regional account sales made in West Virginia. Ashland prepared two exhibits to distinguish the factual situations or compartments involved as to these sales. In the first situation (Exhibit B-1), Ashland noted that only solicitation occurred in West Virginia for sales of fuel oil No.'s 2, 4 and 6. Solicitation was accomplished through one non-resident salesman who generally spent no more than four days per month in West Virginia. Ashland described the solicitation activities as follows:

(1) Procuring of customer's bidding procedure, if any, and product demand.

(2) Providing information on availability of Taxpayer's products and current price schedules.

(3) Inquiring into delivery locations. (Joint Exhibit No. 1).

In the second situation (Exhibit B-2), Ashland noted that sales of fuel oil No.'s 2 and 6 differed from the first situation inasmuch as delivery of the products to Koppers Company and Kingsford Company, both in-state businesses, was made from the inventory maintained at Follansbee, West Virginia. Ashland noted that tax attributable to the transactions described in Exhibit B-2 had been paid and was not being protested.

Similarly, Ashland analyzed each of the remaining nine divisions by the use of one or more SIMOs. Each SIMO was in turn further broken down into one or more compartments supported by an exhibit. Of the thirty-three exhibits prepared by Ashland, it conceded that business operations in seven compartments were subject to tax by West Virginia. In these conceded situations, Ashland noted that more than one activity occurred in West Virginia, such as solicitation and delivery in-state, or local advertising, along with solicitation and rendering of technical assistance in-state.

While most of the SIMOs generally concerned the existence and extent of the above-listed nexus activities, Ashland made sales in two additional ways. The first situation pertained to the Petrochemical Division of Ashland Chemical Company. In addition to the regular sales of solvents and other products to industrial users, the Petrochemical Division sells propylene to the Novamont Corporation for use in its plant at Neal, West Virginia. A product stream of propylene and propane flows through Ashland's pipeline under the Big Sandy River from Ashland's plant at Leach, Kentucky to Novamont's plant at Neal, West Virginia. The product is furnished under the terms of a long-term contract between Ashland and Novamont which was negotiated outside West Virginia. At the Neal plant,

which had no trackage in the immediate vicinity of the refineries. This railroad is the only customer served by the rail loading dock.

Ashland Oil, Inc. owns and operates the facility to serve all of its operations as may be necessary. The Refinery Division of the Ashland Petroleum Company, through its refinery superintendent, controls and supervises all loading activities. The Petitioner notes no office, agency or place of business of this division exists in West Virginia for the railroad sales operation because, as noted above, Ashland Oil, Inc., itself, maintains the facility.

Of the thirty-three factual situations or compartments described by Ashland, three compartments involved the Kenova loading facility. Sales were made by the Allied Oil Division to Appalachian Power Company (Exhibit A-4), and sales were made by the Refinery Sales Division to the Northfolk [sic] & Western Railway Company (Exhibit O-1) and to other refineries (Exhibit Q-2). The assessment included all sales which passed through this facility in which the destination was inside the State of West Virginia. No tax was assessed on sales in which the destination was to other states.

Additional facts pertaining to this case will be cited in the issue section of this decision to either clarify arguments or support findings.

ISSUES AND DETERMINATIONS

The principal issue raised for determination is whether the sales of Ashland Oil, Inc.'s [sic] included in the assessment are subject to business and occupation tax. Ashland earns substantial income in the State of West Virginia and has routinely filed returns and paid business and occupation tax on some of this income. The assessment included income which was not reported by Ashland Oil, Inc. Ashland conceded tax on a portion of these unreported sales but contested the tax on the remaining portion of sales.

Ashland does not object to the assessed tax on the four criteria cited by recent Court opinions as defenses under the

Novamont extracts the propylene and utilizes it as a raw material in its facility. The propane is returned to Ashland's petrochemical center where it is placed in general storage with other propane produced in the refining and petrochemical processes. Ashland asserts that no other activity pertaining to these sales to Novamont occurs in West Virginia.

The second situation involves the Kenova Loading Facility. The Ashland Petroleum Company Division of Ashland Oil, Inc. maintains a major facility in Kenova, West Virginia—near its Leach, Kentucky refineries—for the purpose of loading products produced at the refineries for shipment to various states, including West Virginia. This facility is commonly referred to as the Kenova facility, even though components thereof are located both in West Virginia and Kentucky. The facility, is maintained for the sole purpose of transportation and only used for storage as required for loading processes carried on at the facility.

The Kenova facility is composed of two units, one which serves barge transportation and one which loads tank cars belonging to the Norfolk & Western Railway Company. These units, in turn, are composed of pumps, pipelines, tanks and loading docks, with the pumping station which serves these units and a portion of the pipelines being located in Kentucky. The barge loading dock floats on the Ohio River.

Products are pumped from storage tanks located in Leach, Kentucky through a pipeline which crosses beneath the Big Sandy River to the loading tanks at Kenova, West Virginia. The major portion of this pipeline is in West Virginia. At the Kenova site, there are eighteen barge loading tanks with the capacity of holding 1,060,000 barrels of gasoline, kerosene and diesel fuel, and three rail loading tanks with the capacity of holding 9,000 barrels of diesel fuel. Products are accumulated at the barge loading facility to reduce the time it would take to load a barge directly from the refineries. In addition, many barges cannot be loaded directly from the Kenova refineries because the Big Sandy River is too shallow and narrow.

The railroad tank car loading dock was constructed at Kenova to service the Norfolk & Western Railway Company

Due Process and Commerce Clauses of the United States Constitution. These criteria are:

(a) Whether the activity is sufficiently connected to the State to justify a tax;

(b) Whether the tax is fairly related to the benefits provided the taxpayer;

(c) Whether the tax is fairly apportioned; or

(d) Whether the tax discriminates against interstate commerce.

See Complete Auto Transit, Inc. v. Brady, 430 U. S. 274 (1977); *Moorman Manufacturing Company v. Bair*, 437 U. S. 267 (1978); *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U. S. 734 (1978); *J. C. Penney Co., Inc. v. Hardesty*, 364 S.E.2d 604 (1979). Ashland does not argue that there is a lack [of] benefits provided, that the tax is unfairly apportioned or that the tax discriminates against interstate commerce. Ashland also states that it "has a very pervasive presence in the state of West Virginia and that nexus, for whatever purpose and under any sort of test imaginable undoubtedly exists" (Petitioner's Reply Brief, p. 2).

Ashland instead argues that the present matter is not a nexus case but, rather, a case requiring an underlying connection between the taxpayer's activities in the State and the transactions sought to be taxed. Ashland relies extensively, and almost exclusively, on *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951) to invalidate the present tax assessment. Through the use of the SIMOs, Ashland has attempted to isolate its local activities into compartments, contending that it is not subject to tax because each compartment must be viewed separately without regard to the other compartments or to the taxpayer's entire activities within the State. These compartments were created by dividing Ashland Oil, Inc. into Companies, then into Divisions, then into SIMOs, and finally into thirty-three compartments. Ashland argues that a taxable connection must be found for each of the compartments in order to sustain the tax on the segment of the sales made in that

particular compartment. Ashland concedes that there is a taxable connection for the sales made by seven compartments but asserts that there is no taxable connection for the remaining twenty-six compartments. Thus, Ashland argues *Norton* is dispositive of this case and supports its position that the sales in question are not subject to the business and occupation tax.

Upon a thorough analysis of the factual situation and applicable case law, it is determined that the *Norton* case is not dispositive of the taxability issue raised in the present assessment. There is almost no similarity between the sales operations and activities of Ashland Oil, Inc. and the Norton Company. Furthermore, cases decided subsequent to *Norton* involve factual situations closer to Ashland's situation and espouse principles of law more applicable to the proper resolution of this case.

The *Norton* case, decided in 1951, involved a Massachusetts corporation which manufactured and sold abrasive machines and supplies. Norton derived gross receipts in the State of Illinois from sales resulting from three factual situations:

(1) Direct over-the-counter sales at a Chicago branch office;

(2) Mail orders filled in Massachusetts but received by and/or shipped in the Chicago office to its Illinois customers; and

(3) Mail orders sent directly to Massachusetts and filled by direct shipment to Illinois customers.

Norton paid taxes on its gross receipts under the provisions of the Illinois Retailers' Occupation Tax Act and subsequently filed a claim for refund of the taxes paid.

The Court, in rendering its opinion, first noted that "unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable." *Id.* at 537. Since Norton had satisfied this test by "having gone into the State to do local business", the Court next considered the question as to whether Norton's local activity was sufficiently related to the assertion of state tax power to justify the

exaction. In order to resolve this question, the Court noted that the taxpayer has the burden of "showing that the particular transactions are dissociated from the local business and interstate in nature." *Id.* As to the three situations, the Court found that Norton had not established that the services rendered by the Chicago branch in situations (1) and (2) "were not decisive factors in establishing and holding this market. On this record, no other source of the customer relationship is shown." *Id.* at 538. As to the sales in category (3), the Court found that these sales could not be reasonably attributed to the local business. Thus, the Court ruled that the income derived from orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester was not subject to the Illinois tax.

In the *Norton* situation, the taxpayer maintained only one retail establishment and utilized no solicitors in Illinois to work the territory out of either the home office or the Chicago branch office. In the present situation, Ashland utilizes extensive contacts in this State to establish and hold the market for its sales. As previously noted, Ashland has plants, storage facilities, transportation facilities, numerous retail gasoline stations, oil and natural gas production facilities, and retail and wholesale outlets for marketing various products. Ashland utilizes local advertising, solicitation of orders, delivery by company-owned vehicles, technical advisors and marketing assistance, inventories and offices in this State to promote its sales. Ashland itself notes that it "has a very pervasive presence in the State of West Virginia and that nexus, for whatever purpose and under any sort of test imaginable undoubtedly exists." Petitioner's Reply Brief, p. 2.

Ashland's two companies, Ashland Chemical Company and Ashland Petroleum Company, which made the contested sales in West Virginia, also have extensive operations in this State in their own right. Although Ashland's representative stated that

> The only property of any kind which the chemical company has in the state that we were able to discover is the pipeline which runs from Ashland's refinery and

> petro-chemical center at Leach, Kentucky, across the Big Sandy River, I think it is Neal, West Virginia. We are not able to discover any other property of any kind in the state. (Tr. of July 20 Hearing, pp. 14-15),

the returns filed by Ashland for the two audited years disclose that the Chemical Company had industrial expansion on two facilities in West Virginia. On its return filed for fiscal year ending September 30, 1975, Ashland claimed industrial expansion credit for a conveyor and loadout facility at its Chemical Company plant located at Hansford, West Virginia. On its return filed for fiscal year ending September 30, 1976, Ashland claimed industrial expansion credit for its new Chemical Company plant opened at Neal, West Virginia. Ashland stated in its Schedule C that Total Qualified Investment of this plant was $20,399,976.00. In addition, Ashland employed solicitation for its Chemical Company sales made in West Virginia.

Over ninety per cent (90%) of the assessed liability arose from the sales made by the Ashland Petroleum Company. This Company maintains an inventory at Follansbee, West Virginia and supervises the Kenova Loading Facility. A portion of this Company's sales are made through a retail outlet located in Charleston, West Virginia. The Petroleum Company utilizes all of the sales activities previously mentioned for Ashland Oil, Inc.

Therefore, it is determined that the factual situation in this case is clearly not similar to the factual situation present in the *Norton* case. Considering Ashland by itself or the two Companies by themselves, the sales in question were made through many more contacts than the one in-state office with no territorial solicitation, found in *Norton*.

The Court opinions decided subsequent to *Norton* involve factual situations closer to that of the present case, and espouse principles of law more applicable to the proper resolution of this case. In 1964, the Supreme Court handed down its opinion in *General Motors Corporation v. Washington*, 84 S. Ct. 1564 (1964). At issue there was the State of Washington's business and occupation tax as applied to the gross wholesale

price of motor vehicles, parts, and accessories shipped by General Motors into the State. The activities of General Motors in the state were extensive: it engaged in promotional and supervisory work through its local employees to further sales and preserve the quality of its dealer organization, it maintained a warehouse in Seattle from which the Chevrolet, Pontiac and Oldsmobile dealers obtained a portion of their parts and accessories, and it had a local branch office which assisted Washington dealers in securing better service for its orders.

The taxpayer in *General Motors* conceded and paid the tax on the orders filled at the Seattle warehouse but contested the tax on the sale of items shipped from out of state. The items in question were sold by four divisions of General Motors (Pontiac, Oldsmobile, Chevrolet and General Motors Parts) to independent dealers who directly ordered the items from out-of-state manufacturing plants. As a general rule, the sales and orders were handled and approved by zone offices in Portland, Oregon. As noted by the dissenting opinion, the transactions could be divided into the following three categories:

> (1) Pontiac and Oldsmobile Divisions Sales: These Divisions had no office, establishment or intrastate business in Washington; they operated entirely through Portland zone offices and the Washington sales representatives.
>
> (2) General Motors Parts Division Sales: This Division maintained warehouses in both Seattle, Washington, and Portland, Oregon. The Seattle warehouse sold directly to local Washington dealers and the tax imposed on such sales has been paid and is not disputed here. The sales to Washington dealers of parts and accessories ordered from and delivered by the Portland warehouse were, however, also taxed and those taxes are disputed here.
>
> (3) Chevrolet Division Sales—"Class A and B" Sales: The Chevrolet Division maintained a one-man branch office in Seattle, Washington; and all sales within the territorial jurisdiction of that office have been referred to in this litigation as "Class A" transactions. This one-man

> office operated under the direction of the Portland zone office and conducted no business in the State of Washington other than to facilitate the management and handling of sales and orders through the Portland zone office. The Seattle office, however, dealt only with Washington's northern counties and did not deal with nine of Washington's southern counties; the sales to dealers in those southern counties have been labeled "Class B" sales and had no connection with Chevrolet's Seattle office. The "Class B" sales were therefore similar to those in category (1) above. *Id.* at 1574.

In rendering its opinion, the Court appeared to reiterate the *Norton* rule, but with an added twist. Whereas in *Norton*, the Court had stated that once a taxpayer had come into the state to do local business, it could avoid taxation "only by showing that particular transactions are disassociated from the local business and interstate in nature," *Norton*, *supra* at 380, in *General Motors* it stated that the taxpayer had "the burden of showing the operations of these divisions in the State 'are disassociated from the local business and interstate in nature.' " *General Motors*, *supra* at 1568.

The Court stated:

> Thus, in the bundle of corporate activity, which is the test here, we see General Motors' activity so *enmeshed in local connections* that *it voluntarily paid taxes on various of its operations but insists that it was not liable on others.* Since General Motors elected to enter the State in this fashion, we cannot say that the Supreme Court of Washington erred in holding that these *local incidents were sufficient to form the basis for the levy of a tax* that would not run contrary to the Constitution. *Norton Co. v. Department of Revenue*, *supra*.
>
> The tax that Washington levied is measured by the wholesale sales of the respective General Motors divisions in the State. It is unapportioned and, as we have pointed out, is, therefore, suspect. We must determine whether it is so closely related to the local activities of the corpora-

> tion as to form "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co. v. Maryland*, 347 U. S. 340, 344-345, 74 S. Ct. 535, 539, 98 L. Ed. 744 (1954). On the basis of the facts found by the state court we are not prepared to say that its conclusion was constitutionally impermissible. *Norton Co. v. Department of Revenue*, *supra*, 340 U.S. at 538, 71 S. Ct. at 380. Here, just as in Norton, the corporation so mingled its taxable business with that which it claims nontaxable that we can only "conclude that, in the light of all the evidence, the judgment attributing * * * [the corporation's Washington sales to its local activity] was within the realm of permissible judgment. Petitioner has not established that such services as were rendered * * * [through in-state activity] were not *decisive factors in establishing and holding this market*." *Ibid.* Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a *maze of local connections* as does General Motors, and take advantage of its gain on domesticity, and still maintain the same degree of immunity. (Emphases added) *Id.* at 1571-1572.

As noted by Hellerstein:

> By inquiring whether the aggregate of corporate activity giving rise to disputed sales had sufficient local connections, the Court abandoned a nexus standard requiring that taxable receipts emanate from transactions with a tangible and demonstrable link to local activities. Hellerstein, *State Taxation of Interstate Business and Steel The Supreme Court, 1974 Term: "Standard Pressed Steel" and "Colonial Pipeline"*, 62 Va. L. Rev. 149 at 165 (1976).

The dissent in *General Motors* asserted that the sales of General Motors divided into the three categories previously cited should be compared to the situation in *Norton*. The dissent further asserted that by using the *Norton* test, the sales

in categories (1) and (3) should be eliminated from the measure of the tax as well as the items sold in category (2) from the Portland warehouse. But the majority did not accept this comparison. It adopted the "bundle of corporate activity" test and found the gross receipts of all the divisions were subject to the business and occupation tax.

General Motors was followed by *Standard Pressed Steel Co. v. Washington Department of Revenue*, 95 S. Ct. 706 (1975). Standard Pressed Steel was a manufacturer of aerospace fasteners, with a home office and manufacturing plant in Pennsylvania and another plant in California. Standard's activities in the State of Washington consisted of a single resident employee, Martinson, and a group of non-resident engineers who visited the State approximately twenty-five (25) days per year. None of Standard's local activity was directly involved with the transactions in question. Orders, shipments, negotiations and payments were all handled between Boeing, the principal customer, and Standard. The unanimous Court found that Martinson's critical role in making "possible the realization and continuance of valuable contractual relations between appellant and Boeing," *id.* at 708, created a sufficient link between Standard's in-state activities and its Washington sales to sustain a tax upon all of them. While the Court mentioned the divided opinion rendered in *Norton*, it found the *General Motors* case to be almost precisely in point.

The final case involving a factual situation closer to Ashland's activities is the *J. C. Penney*, case recently handed down [by] the West Virginia Supreme Court of Appeals. J. C. Penney operates sixteen hundred stores throughout the United States, including fifteen stores located in West Virginia. The taxpayer principally derives income in West Virginia from over-the-counter sales, catalogue sales, and finance charges on credit sales. As explained by the Court:

> Catalogue sales are made in two ways—by direct mail and through catalogue desks in Penney's stores. All catalogue sales fall into four categories: customer orders at local catalogue desks where the merchandise is delivered to the

> local store for delivery to the customer; customer orders at the local store where the merchandise is delivered from out-of-state by mail or interstate carrier directly to the customer; customer orders through the mail direct to the local catalogue center where the customer then picks up the merchandise; and, customer orders by mail direct to the out-of-state catalogue center where the merchandise is delivered back to the customer by mail or interstate carrier. *Id.* at 609.

J. C. Penney paid tax on the over-the-counter sales and only contested on appeal the last category of catalogue sales and the finance charges on its direct mail credit sales. These disputed catalogue sales are analogous to the mail order sales deemed not taxable in *Norton*. In upholding the business and occupation tax on J. C. Penney's entire gross receipts, the Court found:

> Like the manufacturer in *Standard Pressed Steel, supra* the activities of the taxpayer are greatly facilitated by its overall operations in West Virginia; there are sufficient contacts with the State to support a tax nexus; and, all of the criteria of *Complete Auto, supra* in terms of fair apportionment, nondiscrimination, and reasonable relationship to the services provided by the State have been met.

Justice Miller in his concurring opinion in *J. C. Penney* presented the following analysis of the *Norton* case:

> As is often the case in state tax controversies involving interstate commerce, each party cites the same decisions as supporting its particular position. The heart of the controversy is whether *Norton v. Department of Revenue*, 340 U.S. 534, 71 S. Ct. 377, 95 L.Ed. 517 (1951), applies to invalidate these two particular taxes.
>
> * * *
>
> *Norton* is, of course, persuasive to the position of the taxpayer here, but it was followed by *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed.2d 430 (1964). *Id.* at 616.

After reviewing the legal principles espoused in both *General Motors* and *Standard Pressed Steel*, Justice Miller further concluded:

> It can be readily seen that *Norton*'s test, whether there is some local service to support the state tax on a particular transaction, has been transformed by *General Motors* and *Standard Pressed Steel* into an inquiry as to the extent of the local business of the taxpayer, which is another way of determining the amount of local services the state extends to the taxpayer. Once a substantial local connection is found, then a tax will be upheld if it bears some reasonable apportionment to the local activity.
>
> The *taxpayer cannot escape taxation by attempting to isolate his local activities into compartments and by contending that each compartment must be viewed separately without regard to the taxpayer's entire activities within the state.* In both *General Motors* and *Standard Pressed Steel*, the taxpayer's in-state activities were thought to be sufficient to uphold the tax even though these activities did not have a substantial direct relationship to the activity taxed.
>
> Penney, through its argument that its direct catalog sales have no local connection, attempts to isolate a small area of its overall activity in the State and asks that we merely look at this local nexus. We cannot, however, ignore Penney's substantial business activity through its numerous retail outlets in this State. Moreover, the record demonstrates that its out-of-state direct catalog sales are so closely entwined with its local presence that any attempt to isolate these sales would do violence to customary retailing concepts.
>
> * * *
>
> Penney's finance charges on credit sales in West Virginia are taxable under the same analysis that applies to its out-of-state catalog sales. From a legal standpoint, once its substantial local presence is established, Penney is subject to a fairly apportioned tax on all of its activities

> within the State, *regardless of whether a particular aspect, in isolation, may have fewer local connections*. (Emphases added) *Id.* at 617-618.

Thus, on the one hand there is the *Norton* factual situation of one office and direct mail service and on the other hand the *General Motors—J. C. Penney* situation of multiple divisions of one company doing business in the state. Ashland clearly falls into the latter situation.

Applying the legal principles formulated in the *General Motors* case and followed in *Standard Pressed Steel* and *J. C. Penney*, it is determined that the entire gross receipts included in the assessment are subject to the business and occupation tax. Ashland has entered the State of West Virginia and engaged in activities herein. It voluntarily pays considerable taxes on its West Virginia operations (over one-hundred seventy-five million dollars in gross income during the two audited years). The bundle of Ashland's corporate activity is so extensive that even Ashland fails to protest the lack of nexus. Although Ashland has artificially divided its sales into compartments, it has failed to establish that its services were not substantial "with relation to the establishment and maintenance of sales, upon which the tax was levied," *General Motors, supra*. at 1571.

Ashland "cannot escape taxation by attempting to isolate" its "local activities into" Companies, then into Divisions, then into SIMOs and finally into thirty-three compartments "and by contending that each compartment must be viewed separately without regard to the taxpayer's entire activities within the State." *J. C. Penney, supra* at 617. As noted by the Court in *Mobil Oil Corp. v. Com'r of Taxes of Vermont*, 100 S. Ct. 1223 (1980):

> [I]t becomes misleading to characterize the income of the business as having a single identifiable "source". Although separate geographical accounting may be useful for internal accounting, for the purposes of State taxation it is not constitutionally required. *Id.* at 1232.

Even to view the sales made by the two Companies as separate transactions does not support Ashland's position. Both of these Companies had far more in-state activities than the four divisions in *General Motors* and the catalog and credit divisions in *J. C. Penney*. Therefore, it is determined that the *Norton* case is not dispositive of the issue raised in this case, and furthermore that the sales made by Ashland Oil, Inc. are subject to business and occupation tax under the principles of law formulated and applied in *General Motors*, *supra*, *Standard Pressed Steel*, *supra*, *Complete Auto Transit*, *supra*, and *J. C. Penney*, *supra*.

The second issue raised for determination pertains to the penalties assessed on the deficiency. It is determined that the penalties relating to the conceded items must be affirmed. The Petitioner has raised viable legal arguments to the remaining items in the assessment and it is determined that reasonable cause exists for waiver of the penalty on these items.

WHEREFORE, it is the DECISION of Herschel H. Rose III, Tax Commissioner of the State of West Virginia that the assessment for business and occupation tax issued against Ashland for the fiscal years ending September 30, 1975 and September 30, 1976 in the amount of $181,313.22, with revised penalties thereon in the amount of $2,620.52, for a total liability in the amount of $183,933.74 should be and is hereby affirmed as modified.

/s/ Herschel H. Rose III
Herschel H. Rose III
State Tax Commissioner

4/21/81
Date Rendered

Appendix D

FINAL ORDER ENTERED BY THE SUPREME COURT OF APPEALS REVERSING THE JUDGMENT OF THE CIRCUIT COURT

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 12th day of November, 1986, the following order was made and entered, to-wit:

CA-81-2010
16962

Ashland Oil, Inc., Petitioner Below,

Appellee

—v.—

Herschel H. Rose, III, State Tax Commissioner, Respondent Below,

Appellant

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 25th day of February, 1985.

The Court having maturely considered the motion to reverse and the original record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Kanawha County rendered on the 25th day of February, 1985, be, and the same is hereby, set aside, reversed and annulled, and that the appellant, Herschel H. Rose, III, State Tax Commissioner, do recover of and from the appellee, Ashland Oil, Inc., his costs about the prosecution

of his appeal in this Court in this behalf expended. AND this action is remanded to the Circuit Court of Kanawha County for further proceedings consistent with the written opinion aforesaid, and further according to law; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Brotherton was concurred in by Chief Justice Miller, and Justices Neely, McGraw, and McHugh.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk Supreme Court of Appeals

Appendix E

NOTICE OF APPEAL

No. 16962

In The
SUPREME COURT OF APPEALS
of West Virginia

ASHLAND OIL, INC., a Kentucky Corporation,

Appellee, Petitioner Below

—v.—

HERSCHEL H. ROSE, III
State Tax Commissioner of West Virginia,

Appellant, Respondent Below

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ashland Oil, Inc., the appellee above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of West Virginia, entered in this proceeding on November 12, 1986, setting aside and reversing the judgment of the Circuit Court of Kanawha County entered February 25, 1985 reversing the determination and assessment of the Tax Commissioner of West Virginia of Business and Occupation Tax claimed to be due and owing the State by Ashland Oil, Inc.

A copy of this Notice will also be filed in the Circuit Court of Kanawha County, West Virginia, inasmuch as the record has been returned from this Court to the Circuit Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Susan C. Wittemeier
Susan C. Wittemeier, Esquire
Goodwin & Goodwin
1500 One Valley Square
Charleston, West Virginia 25301
Telephone: (304) 346-7000
Counsel for Appellee

Filed
January 20, 1987
/s/ Ancil G. Ramey
Clerk of the Supreme
Court of Appeals of
West Virginia

AFFIDAVIT OF SERVICE

State of West Virginia,
County of Kanawha, To-Wit:

I hereby certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served by mailing a true copy thereof to the Appellant's attorneys, Charles G. Brown, Attorney General, addressed to him at the Attorney General's Office, State Capitol, Charleston, West Virginia 25305, and Gregory A. Morgan, Special Assistant Attorney General, addressed to him at Young, Morgan & Cann, Suite One, Schroath Building, Clarksburg, West Virginia 26301, both in the regular United States mail, postage prepaid, this 20th day of January, 1987.

/s/ Susan C. Wittemeier

Susan C. Wittemeier, Esquire
Goodwin & Goodwin
1500 One Valley Square
Charleston, West Virginia 25301
Telephone: (304) 346-7000
Counsel for Appellee

Taken, subscribed and sworn to before me, a Notary Public in said county and state, this 20th day of January, 1987. My commission expires September 15, 1988.

/s/ Shirley M. Hill

Notary Public, Kanawha County,
West Virginia

Appendix F

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 8, Clause 3 (the "Commerce Clause"):

> The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with Indian tribes.

West Virginia Code as in effect prior to April 13, 1985:

§ 11-13-1 (1971). Definitions.

* * *

"Sale," "sales" or "selling" includes any transfer of the ownership of or title to property, whether for money or in exchange for other property.

* * *

"Gross income" means the gross receipts of the taxpayer, other than a banking or financial business, received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees, reimbursed costs or expenses or other emoluments however designated and including all interest, carrying charges, fees or other like income, however denominated, derived by the taxpayer from repetitive carrying of accounts, in the regular course and conduct of his business, and extension of credit in connection with the sale of any tangible personal property or service, and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid or any other expenses whatsoever. "Gross income" of a bank-

ing or financial business is specified in section two-k [§ 11-13-2k] of this article.

"Gross proceeds of sales" means the value, whether in money or other property, actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind.

* * *

"Selling at wholesale" or "wholesale sales" shall mean and include: (1) Sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by this article or by article twelve-A [§ 11-12A-1 et seq.] of this chapter; and (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

§ 11-13-2 (1971). Imposition of privilege tax.

There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-k [§§ 11-13-2a to 11-13-2k], inclusive, of this article.

If any person liable for any tax under section two-a or two-b [§§ 11-13-2a or 11-13-2b] shall ship or transport his products or any part thereof out of the State without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the State shall be the basis for the assessment of the tax imposed in said sections, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a and two-b [§§ 11-13-2a or 11-13-2b] of this article shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under section two-a or two-b [§§ 11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products at retail in this State shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c [§ 11-13-2c] of this article for the privilege of engaging in the business of selling such natural resources or manufactured products at retail in this State. But any person exercising any privilege taxable under sections two-a or two-b [§§ 11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article.

Manufacturers exercising any privilege taxable under section two-b [§ 11-13-2b] of this article shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article for the privilege of selling their manufactured products for delivery outside of this State, but the gross income derived from the sale of such manufactured products outside of this State shall

be included in determining the measure of the tax imposed on such manufacturer in section two-b [§ 11-13-2b].

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under section two-a [§ 11-13-2a], and using or consuming the same in his business or transferring or delivering the same as any royalty payment, in kind, or the like, shall be deemed to be engaged in the business of mining and producing coal, oil, natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe. (1921, c. 110, § 2; Code 1923, c. 31A; § 2; 1925, Ex. Sess., c. 1, §§ 2-2h; 1933; Ex. Sess., c. 33; 1935, c. 86; 1955, c. 165; 1971, c. 169.)

§ 11-13-2a (1971). Severance, extraction and production of coal and other natural resource products.

Upon every person exercising the privilege of engaging or continuing within this State in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resource products, the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided, multiplied by the respective rates as follows: Coal, three and five-tenths percent; limestone or sandstone, quarried or mined, two and two-tenths percent; oil, four and thirty-four one hundredths percent; natural gas, in excess of the value of five thousand dollars, eight and sixty-three one hundredths percent; blast furnace slag, four and thirty-four one hundredths percent; sand, gravel or other mineral product not quarried or mined, four and

thirty-four one hundredths percent; timber, two and two-tenths percent; other natural resource products, two and eighty-six one hundredths percent. The measure of this tax is the value of the entire production in this State, regardless of the place of sale or the fact that the delivery may be made to points outside the State: Provided, however, that for the purposes of the production of oil classification, and the production of natural gas classification, as set forth in this section, multiple co-owners of oil or natural gas, in place, lessees thereof, or others being vested with title and ownership to part or all of the oil and gas, as personal property, immediately after severance, extraction, reduction to possession and production, except royalty recipients, in kind, shall be deemed to be a "group or combination acting as a unit" and one "person," as defined in section one [§ 11-13-1] of this article, if not otherwise defined therein, whenever engaged in the business of producing oil or natural gas through common use, by joint or separately executed contracts, of the same independent contractor, driller or operator's services; and notwithstanding provisions of private contracts for separate deposit of gross receipts in separate members' accounts or for members of such group or combination to take in kind any proportionate part of such natural resources.

Lessees, sublessees or other denominated lessees are considered to be producers of all of the oil or natural gas produced, regardless of any payment, in kind, to lessors, sublessors or other denominated lessors of a part of such natural resources as rents or royalties. Recipients of royalties or rents, in kind, in cash or otherwise are taxable on their gross income pursuant to the provisions of section two-i [§ 11-13-2i] of this article. (1935, c. 86; 1955, c. 165; 1959, c. 167; 1971, c. 169.)

§ 11-13-2b (1974). Manufacturing, compounding or preparing products; processing of food excepted.

Upon every person engaging or continuing within this State in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any article or articles,

substance or substances, commodity or commodities, or electric power produced by public utilities or others and not taxed under other provisions of this article, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), the amount of the tax to be equal to the value of the article, substance, commodity or electric power or newspaper, manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of eighty-eight one hundredths of one percent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. However, the dressing and processing of food by a person, firm or corporation, which food is to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of these products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provided in section two-c [§ 11-13-2c].

It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within this State and partially manufactures, compounds or prepares such products outside of this State the measure of his tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing within this State bears to the entire payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of his tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles. (1935, c. 86; 1951, c. 179; 1955, c. 165; 1959, c. 167; 1967, c. 188; 1971, c. 169; 1974, c. 133.)

§ 11-13-2c (1971). Business of selling tangible property; sales exempt.

Upon every person engaging or continuing within this State in the business of selling any tangible property whatsoever, real or personal, including the sale of food, and the services incident to the sale of food in hotels, restaurants, cafeterias, confectioneries, and other public eating houses, except sales by any person engaging or continuing in the business of horticulture, agriculture or grazing, or of selling stocks, bonds or other evidences of indebtedness, there is likewise hereby levied, and shall be collected, a tax equivalent to fifty-five one hundredths of one percent of the gross income of the business, except that in the business of selling at wholesale the tax shall be equal to twenty-seven one hundredths of one percent of the gross income of the business. (1935, c. 86; 1937, c. 105; 1955, c. 165; 1959, c. 167; 1971, c. 169.)

Appendix G

DESIGNATION OF CORPORATE RELATIONSHIPS

Ashland Oil, Inc., filing this Jurisdictional Statement as Appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Ashland Oil, Inc. is not owned by any parent corporation.

Ashland Oil, Inc. has an ownership interest in the following subsidiaries:

A. B. & H. Processing, Inc.
Allegheny Land Company
Arch Coal Sales Company, Inc.
Arch Construction, Inc.
Arch Mineral Corporation
Arch of Alabama, Inc.
Arch of Illinois, Inc.
Arch of Kentucky, Inc.
Arch of Wyoming, Inc.
Arch Service Corporation
Ark Land Company
Ashland Coal International Ltd.
Ashland Coal, Inc.
Ashland Südchemie Giesserei-Chemikalien GmbH
Ashland Terminal, Inc.
Ashland-Avebene S.A.
Ashland-Südchemie-Kernfest GmbH
B. V. Ashland-Suedchemie V.H. Necof
Cavalier Coal Terminal Company
Cloverlick Land Company
Cloverlick Mining Company
Dana Coal Company
Devon Chemicals, Inc.
DMA Technical Consultants, Inc.

DMJM/Thomson Ltd.
Drennen Tipple Corporation
Energy Development Co.
Etablissement Locab
Filbeth Enterprises, Inc.
Ford Dock, Inc.
Hobet Mining, Inc.
Hobet Terminals, Inc.
Hodogaya Ashland Co., Ltd.
Iberia Ashland Chemical S.A.
James River Coal Terminal Company
Kernfest-Webac, A.B.
Melamine Chemicals, Inc.
Midlands Chrome Mines (Private) Limited
Mountain Mining, Inc.
Mountaineer Land Company
P. C. Holding, Inc.
Pipestone Creek Mining Co.
Platt River Mining Co.
R&H Service and Supply Co.
River Cities Leasing, Inc.
Saarcar Coal, Inc.
Servco, Inc.
Stovall-Files Coal Company, Inc.
Sunbru, Inc.
Superamerica of Florida, Inc.
TMSI Arabia Ltd.
Tri-State Terminals, Inc.
Tri-State Testing Co., Inc.
Webac Oy
Wicmap Transport Pty. Ltd.

Ashland Oil, Inc. does not have an ownership interest in any other subsidiaries (excepting only wholly owned subsidiaries).

Ashland Oil, Inc. does not have any affiliates.

Dated: February 9, 1987.

No. 86-1295

Supreme Court, U.S.
FILED
APR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ASHLAND OIL, INC.,

Appellant,

v.

HERSCHEL H. ROSE, III,
Tax Commissioner
of the State of West Virginia,

Appellee.

On Appeal from the Supreme Court of Appeals of West Virginia

MOTION TO DISMISS OR AFFIRM

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State Capitol
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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether questions of civil retroactivity are governed by the standard enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

2. Whether the rules announced in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied prospectively.

3. Whether the decision below is a final judgment within the meaning of 28 U.S.C. § 1257(2).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1295

ASHLAND OIL, INC.,

Appellant,

v.

HERSCHEL H. ROSE, III,
Tax Commissioner
of the State of West Virginia,

Appellee.

**On Appeal From The
Supreme Court Of Appeals
of West Virginia**

MOTION TO DISMISS OR AFFIRM

This appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgement of the Supreme Court of Appeals of West Virginia on the grounds that this appeal does not present a substantial federal question and that the judgement below rests on an adequate nonfederal basis as well as other grounds which this appellee will present herein, all of which establish that the Court should not set this case for argument.

OPINIONS BELOW

The opinion below by Justice Brotherton of the Supreme Court of Appeals of West Virginia is reported as *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986). A copy of the opinion below is set out in full in the Appendix, attached to appellant's Jurisdictional Statement [JS].

The order of the Circuit Court of Kanawha County granting the appellant summary judgment dated February 25, 1985, and the administrative decision of the Tax Commissioner of the State of West Virginia dated April 21, 1981, are set out in full in the Appendix attached to the appellant's Jurisdictional Statement.

JURISDICTION

Ashland Oil, Inc. seeks to appeal a decision of the Supreme Court of Appeals of West Virginia reversing the Circuit Court of Kanawha County, West Virginia, which applied this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), on a prospective basis from June 12, 1984. Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(2) (1982), "[b]ecause a decision of the West Virginia Supreme Court upholds a state statute against a challenge under the United States Constitution." Appellant's Jurisdictional Statement at 2. There is here, however, no constitutional challenge.

The Court below agreed with the appellant that the taxing scheme at issue was unconstitutional as violative of the Commerce Clause and that it was invalidated by *Armco*. The only issue presented to this Court is whether prospective application of *Armco* is

proper under the circumstances. As such, appellant's assertion of jurisdiction is invalid.

This Court has repeatedly recognized that questions of retroactivity are not constitutional in nature. *Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932) *U.S. v. Johnson*, 457 U.S. 537 (1982). For the purposes of this appeal, no issue remains where a state statute has been "drawn in question." The lower court did not uphold a state statute in the face of a constitutional challenge, and this appeal is not within the jurisdiction of 28 U.S.C. § 1257(2). Accordingly, this appeal should be dismissed.

STATEMENT OF THE CASE

Ashland Oil, Inc. is an Ohio Corporation, (hereinafter sometimes referred to as "Taxpayer" or "Ashland"), qualified to hold property and do business as a foreign corporation in the State of West Virginia. During the period in question, Ashland carried on extensive business activities in West Virginia. As a result of such activities, Hershel H. Rose III, then Tax Commissioner of the State of West Virginia, predecessor in office to the appellee herein, Michael E. Caryl, (hereinafter sometimes referred to as "the Appellee" or "the Commissioner"), issued a notice and assessment of tax against appellant, Ashland for business and occupation tax for the fiscal years ending September 30, 1975 and September 30, 1976, for tax in the amount of $181,313.22, with penalty added in the amount of $34,141.67, for a total assessed tax and penalty of $215,454.89.

Administrative hearings were held on several days in 1978. By Administrative Decision dated April 21, 1981, Commissioner Rose determined that the Tax-

payer was indebted to the State of West Virginia for tax in the revised amount of $183,933.74. On May 26, 1981, the Commissioner was served with the Notice of Appeal by which the Taxpayer sought review of the administrative decision by the Circuit Court of Kanawha County, West Virginia. By agreement, the parties submitted briefs to the Circuit Court in support of their respective positions. Following oral argument on August 27, 1982, the case was submitted for decision.

Two years later, in October 1984, subsequent to the *Armco* decision, Taxpayer moved for summary judgment based on the discrimination rulings in *Armco*. After hearing held January 21, 1985, and after denying the Commissioner's request to file a supplemental brief on the impact of the *Armco* decision, the Circuit Court granted the summary judgment motion, thereby annulling the assessment.

Prior to June 12, 1984, the date of issuance this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), the issues presented to the Circuit Court, and prior to that at the administrative level, revolved solely around whether certain of Ashland's business activities within West Virginia constituted sufficient nexus such that the business and occupation tax could be constitutionally levied on its wholesale sales to West Virginia customers. The *Armco* case involved nexus issues which are highly significant and relevant to the case at bar, and which were addressed and argued before this Court. Such issues were not reached because this Court determined that the taxing scheme was facially discriminatory. At the Circuit Court level, the parties herein had considered the

resolution of these nexus issues to be key to resolution of the Ashland assessment.

The West Virginia Supreme Court of Appeals, by decision dated November 12, 1986, reversed the order of the Circuit Court, and applied the *Armco* decision prospectively from June 12, 1984, holding that "the reliance of the State of West Virginia on a presumably valid tax outweighs any injury that may be sustained by Ashland on account of our holding of prospectivity." The Court also remanded the remaining nexus issues herein back to the Circuit Court for further proceedings.

ARGUMENT

I. THE WEST VIRGINIA SUPREME COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARDS FOR PROSPECTIVE APPLICATION OF NEW RULES IN CIVIL CASES.

A. THIS COURT PREVIOUSLY HAD THE OPPORTUNITY TO DECIDE THE QUESTION OF PROSPECTIVITY AND DECLINED TO DO SO.

This case comes before the Court as an appeal from the ruling of the West Virginia Supreme Court of Appeals holding that this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) be applied on a prospective basis from the date of that decision, June 12, 1984. The Court below found that the assessment against the Taxpayer came within this Court's holding in *Armco*, but, employing the analysis enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), found that prospective application was proper.

The West Virginia Court was presented with the prospectivity issue as a result of this Court's October 9, 1984 denial of the Commissioner's Petition for Re-

hearing filed subsequent to *Armco*. The Petition for Rehearing had initially raised the issue of prospective application. Relying on *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the West Virginia Court properly interpreted that resolution of the prospectivity question had been referred to it by this Court. *Bacchus*, decided on June 29, 1984, two weeks after *Armco*, held that the issues of remedies or refunds when a state tax is found unconstitutional, are frequently interwined with state law and are better resolved at the state level. This position was subsequently reaffirmed in *Hooper v. Bernalillo County Assessor*, 472 U.S. ___, 105 S. Ct. 2862, 2869 (1985), and again in *Williams v. Vermont*, ___U.S. ___105 S. Ct. 2465 (1985).

B. THE GOVERNING STANDARD FOR QUESTIONS OF PROSPECTIVITY IS THAT ENUNCIATED IN *CHEVRON OIL CO. V. HUSON*.

The Taxpayer's initial attack on the decision below is that the West Virginia Court employed the wrong analysis as to civil prospectivity. This Court has explicitly stated that all questions of civil retroactivity are governed by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Taxpayer asserts on the other hand that the correct rule is the common law rule articulated by Chief Justice Marshall in *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). That is, that a newly announced rule of law be applied to both civil and criminal cases pending on direct review. Ashland took a contrary position below. Before the West Virginia Court, the Taxpayer cited the *Chevron* standards as the proper test in determining whether retroactivity was appropriate, and did not cite *The Schooner*

Peggy, supra. Brief of Appellee, Ashland Oil v. Rose, 350 S.E.2d at 531 (W. Va. 1986).

The taxpayer's assertion that civil as well as criminal cases on direct appeal are subject to newly announced rules of law is clearly erroneous. This Court has expressly recognized different standards for civil and criminal retroactivity. The schism in the standard for applying new rules of law governing the conduct of criminal prosecutions to cases on direct appeal began with *Linkletter v. Walker,* 381 U.S. 618 (1965), and, was expressly recognized by this Court in *U.S. v. Johnson,* 437 U.S. 537 (1982). After an extensive review of the use of retroactive application in criminal cases, *Johnson* held that criminal procedure decisions based on the Fourth Amendment are to apply retroactively to convictions not final at the time of the decision. At the conclusion of the decision, Justice Blackmun expressly stated that *Johnson* had no impact on civil cases by explaining: "Finally, all questions of civil retroactivity continue to be governed by the standard enunciated in *'Chevron Oil Co. vs. Huson'*," 437 U.S. at 563.

This distinction between civil and criminal prospectivity was reinforced in *Griffin v. Kentucky,* 55 U.S.L.W. 4089 (January 13, 1987) which held that new rules of criminal procedure apply to all state or federal *criminal* cases pending on direct review with no "clear break" exception. In *Griffin,* Mr. Justice Blackmun again specified that *Chevron* enunciated the governing standard in all civil cases. "We noted in *Johnson* that our review did not address the area of civil retroactivity. *See* 447 U.S. at 563. That area continues to be governed by the standard enunciated in *Chevron Oil Co. v. Huson* . . ." n.8, *Id.* at 4091.

The taxpayer gratutiously relies on the reasoning in *Griffin* to mount the present challenge to the West Virginia Supreme Court's use of the *Chevron* standard. The West Virginia Court has anticipated this contention, and answered Ashland's reliance on the criminal rule as follows:

> Also, we do not consider the application of prospectivity in criminal rights cases such as *People v. Boyd*, 38 Cal. 3d 762, 215 Cal. Rptr. 1, 700 P.2d 782 (1985), dispositive in a civil setting. Where a decision of unconstitutionality affects the life or liberty of a convicted criminal, the Supreme Court has extended the rules of prospective operation to include pending cases, while limiting retroactivity in order not to disturb final judgments. Such considerations are not present in civil cases, and a strict rule of prospectivity may therefore be applied.

350 S.E.2d at 536 n.10.

The reasoning behind the civil/criminal distinction recognized by this Court and by the lower Court is clear. Criminal prosecutions present questions "of life and liberty" to the defendant.

It is because of such considerations that prospectivity rules have been adjusted according to the nature of the new constitutional rule. For example, where constitutional guarantees such as that against double jeopardy are involved, the rule mandates that the trial court lacks authority to try the Defendant at all, *Ashe v. Swenson*, 397 U.S. 436 (1970). These policy considerations mandating retroactive application where the new rule of criminal procedure to be applied restricts the jurisdiction of the trial court.

Conversely, a decision resulting in a more expansive interpretation of the substantive basis of criminality would require only prospective application. Such factors are not present in civil cases.

Further undercutting Ashland's argument is the fundamental difference between the operation of civil and criminal retroactivity rules as recognized in *U.S. v. Johnson, supra.* Prior to *Griffin,* when a new rule of criminal procedure was found to be a "clear break" with the previous law, a holding of nonretroactivity almost invariably resulted. Conversely, in the civil context, the "clear break" principle is merely the first part of the three-prong *Chevron* test, and is only the threshold prerequisite for consideration of civil prospectivity. Under *Chevron* analysis, the history, purpose and effect of the new rule, as well as the inequity that would be imposed by its retroactive application, remain to be examined. See *U.S. v. Johnson,* n.12, 457 U.S. at 550.

The reliance factors which form the basis for nonretroactivity in civil cases, in the first instance, form a further basis for the distinction between criminal and civil prospectivity. As noted commentator has observed:

> [Decisions applied prospectively] have a common objective, to rid the law of an unsound rule and at the same time preclude undue hardship to a party that has justifiably relied on it. Reliance plays its heaviest role in such areas as property, contracts, and taxation, where lawyers advise clients extensively in their planning on the basis of existing precedents. Traynor, *Quo Vadis, Prospective*

Overruling: A Question of Judicial Responsibility, 28 Hastings L.J. 533, (1977).

350 S.E.2d 535 n.7.

Criminal cases simply do not present the same questions of reliance and resulting hardship to the prosecutorial authorities as civil cases do to both parties.

Ashland's argument overlooks perhaps the most fundamental distinction between criminal and civil retroactivity. In criminal cases, even in the wake of *Griffin*, all rules of criminal procedure announced are subject to application to only pending cases on direct appeal regardless of whether the rule constitutes a "sharp break" with prior law. In civil retroactivity, in contrast, decisions ordinarily operate on a fully retroactive basis. Only where a newly announced rule can meet the *Chevron* threshold test will nonretroactive application even be considered.

Ashland's contention that the area of civil retroactivity is a developing "quagmire" is completely without merit. The principal support for this unfounded assertion is a pre-*Chevron* case, *U.S. v. Donnelly*, 397 U.S. 286. The Court has made quite clear the standard to applied in civil cases, and such rules are sound and grounded in logic.

II. THE *CHEVRON* TESTS FOR PROSPECTIVE APPLICATION ARE SATISFIED HERE.

In *Armco*, the statutory scheme employed by West Virginia was declared facially discriminatory in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3. The Tax Commissioner of the State of West Virginia submits respectfully that the rules of law announced in the *Armco* decision, *supra*, were correctly applied on a prospective basis from June 12, 1984.

The Federal Constitution has no voice on the subject of prospective or retroactive application, *United States v. Johnson*, 457 U.S. 537, 542 (1982), but the decisions of this Court have established criteria to determine whether or not a civil decision should be applied prospectively. Appellee submits that the *Armco* decision clearly fulfills each and every one of the *Chevron* criteria for prospective application.

As established in the first section of this motion, the recognized standards governing prospective application of judicial decisions in civil cases were set forth in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971). This Court recognized the standards as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, * * * 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation.' * * * Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citations omitted].

404 U.S. at 106-107.

Under this three-step test, the *Armco* decision clearly should be prospectively applied.

The first stage of the three-prong *Chevron* test, is a threshold standard which questions whether the decision to be applied establishes a new principle of law. *Armco* certainly did so. This Court was presented with the issue of whether West Virginia's wholesale gross receipts tax was unconstitutionally discriminatory in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). The tax was expressly sustained by the dismissal of the appeal for lack of a substantial federal question. This amounts to a ruling on the merits. See *Hicks v. Miranda*, 422 U.S. 332 (1975).

The Court in *Armco* overruled the clear past precident of *Columbia Gas*, explaining in footnote 7:

> We acknowledge our recent dismissal for want of a substantial federal question of a case raising, inter alia, a nearly identical challenge to the West Virginia gross receipts tax. *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). We may find it necessary not to follow such a precedent when the issue is given plenary consideration. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979).

Armco Inc. v. Hardesty, 467 U.S. 638 at n.7.

In addition to overruling a decision less than two years old, *Armco* established two "new rules" which make it a decision of national significance in the area of state taxation. First, citing *Maryland v. Louisiana*,

451 U.S. 725 (1981), this Court found that the gross privilege tax on manufacturing at the rate of .88% was not a compensatory tax; that is one imposed to offset the exemption of intrastate wholesaler/manufacturers from payment of the lower .27% gross tax rate on the privilege of making wholesale sales in West Virginia of products which they manufacturer in West Virginia and sell there at wholesale. Second, the principle of "internal consistency," previously a net income apportionment test applied in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), was employed as a discrimination test for the first time.

These two "new rules" first announced in *Armco*, represented a sharp break from prior law. The Armco opinion significantly restricted the doctrine of compensatory taxes with regard to the scope of examination of a state's tax treatment of goods and materials to be consumed within a state. The disapproval of *Caskey Baking Co. v. Virginia*, 313 U.S. 177 (1941), in footnote 7 of *Armco*, signalled a restriction of the Court's analysis in determining whether a tax is compensatory in nature from a comprehensive examination of a state's entire scheme of taxation to a much narrower review of a state's taxation of "substantially equivalent events." Under this narrower review, a taxpayer's wholesale sales of manufactured products and its manufacturing of such products are not "substantially equivalent events." Therefore, the Court held that the .88% rate on manufacturing was not compensatory for the lower .27% levy then on wholesale sales.

Likewise, there was no prior indication that the "internal consistency" requirement, under which the

Court must hypothesize that another state has adopted a tax identical to the tax in question, which was previously applied only to apportionment formulas used in net income taxes, would be grafted onto the discrimination test and applied to privilege taxes measured by gross receipts. In view of these two "new rules" and the Court's reversal of *Columbia Gas Transmission Co. v. Rose, supra,* the *Chevron* threshold test is satisfied.

That these are "new rules" is vividly demonstrated by the flurry of scholarly commentary they have generated. See, e.g., Lathrop, *Armco - A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause,* 63 Taxes 551 (August 1985); Judson and Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat from Economic Reality in Analysis of State Taxes,* 87 W. Va. L. Rev. 723 (1985); Lightburn & McAuthur, *U.S. Supreme Court Ignores Unitary Issues in Armco, Inc. Opting for Discriminatory Finding,* 3 J. of State Taxation 211 (1984); *Note, A Call for Internal Consistency Among State Taxing Schemes: Armco, Inc. v. Hardesty,* 38 Tax Lawyer 519 (1985).

These articles have focused on the two "new rules" announced in the *Armco* opinion as well as the unitary rule/nexus issue which this Court did not reach in *Armco.* Special emphasis is placed on the impact of the "internal consistency" rule. These commentators predicted, as did the lower Court, that *Armco* signalled a return to the semantics-oriented, formalistic approach rejected by this Court in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977). See *Judson and Duffy, supra,* at 741. Although the Commissioner is not seeking reconsideration here, clearly, the hold-

ing in *Armco, supra,* was not foreshadowed, and the "substantially equivalent event" and "internal consistency" tests as modified by *Armco* should be recognized as "new rules."

Ashland attacks the sufficiency of these "new rules" on the basis that there was no break with clear past precedent. Such arguments have a hollow ring. The taxpayer's position relies principally on *Columbia Steel Co. v. Washington,* 30 Wash. 2d 658, 1982 P.2d 976 (1948), and on the dissenting opinion in *General Motors v. Washington,* 377 U.S. 439 (1964). These older holdings can hardly be considered clear foreshadowing of such a change in the law. Ashland feigns astonishment at the lower court's reliance on the *Columbia Gas,* ignoring the fact that, at the time of that decision, there had been no successful challenge to West Virginia's tax scheme for 49 years. Certainly West Virginia could reasonably rely on this dismissal on the merits and, just as certainly, such a dismissal is entitled to the same respect by state courts as is a decision following the Court's plenary consideration. *Hicks v. Miranda,* at 344.

Taxpayer's reliance on *Columbia Steel, supra,* is thoroughly misplaced. *Columbia Steel* did involve an exemption in the State of Washington's privilege tax system which was virtually identical to the exemption in *Armco,* and that exemption was found to discriminate against interstate commerce. However, the Washington Supreme Court in that case did not attempt to analyze the issue in terms of the actual effect of the exemption or consider the exemption in conjunction with that State's other tax provisions. The Washington Court clearly invalidated the tax on

purely semantic grounds without consideration of the practical economic realities involved, and the Washington court later recognized as much in *B. F. Goodrich v. State*, 38 Wash. 2d 663, 231 P.2d 325 (1951).

Ashland also maintains that internal consistency is not an unforseen new rule of law but is, rather, only a new label on existing law. This contention is based on certain language in *Gwen White & Prince v. Henneford*, 305 U.S. 434 (1939).

The issue in that case was whether Washington State's "business activities" tax created an unconstitutional burden on interstate commerce. The Court held that it did. The opinion, like *Columbia Steel, supra*, is based on the formalistic, semantics-oriented approach rejected by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). *Compare Standard Pressed Steel v. Department of Revenue of Washington*, 419 U.S. 560 (1975).

Prior to *Armco*, the question of whether a state taxing scheme was discriminatory in nature turned on the ability of the taxpayer to demonstrate actual "dollars and cents" discrimination. See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). That is, the tax was to have been examined for its practical effect, *Maryland v. Louisiana*, 451 U.S. 725 (1981). The internal consistency rule requires no such showing. The language relied on by Ashland from *Gwen, White & Price* was in no manner the rule in effect at the time of *Armco*.

One need look no further than the dissent in *Armco* to find a rebuttal to Ashland's contention:

> The Court also justifies its decision on the ground that if Ohio, or any state where ap-

> pellant may manufacture products sold in West Virginia, imposed a manufacturing tax, appellant might possibly pay more taxes on its goods sold in West Virginia than a local manufacturer. But, appellant has not demonstrated that it in fact pays a higher tax burden in West Virginia solely by reason of interstate commerce. The court sidesteps that fact, however, by borrowing a concept employed in our net income tax cases. Under that line of cases, a state tax must have an internal consistency that takes into consideration the impact on interstate commerce if other jurisdictions employed the same tax. See *Container Corp. of America v. Franchises Tax Board*, 463 U.S. 159 (1983). It is perfectly proper to examine a state's net income tax system for hypothetical burdens on interstate commerce. Nevertheless, that form of analysis is irrelevant to examining the validity of a gross receipts tax system based on manufacturing or wholesale transactions. Where a state's taxes are linked exactly to the activities taxed, it should be unnecessary to examine a hypothetical taxing scheme to see if interstate commerce would be unduly burdened. [Citations omitted].

467 U.S. at ___, 105 S. Ct. 2626 (Rehnquist, J. diss.)

Subsequent to *Armco*, it is no longer necessary for a taxpayer to show actual discrimination to maintain a successful Commerce Clause claim, as previously required. The "actual dollars and cents" standard of *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963)

was abandoned. Clearly, therefore, the threshold *Chevron* test has been satisfied.

The second prong of the *Chevron* test requires inquiry into the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will retard this operation." Retrospective application of *Armco, supra,* will not further the purpose or operation of the Commerce Clause, which is to create an area of free trade among the several states. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 327 (1977). There is no likelihood that refunding taxes collected, or, as is the case here, annulling an assessment for fiscal years 1975 and 1976, would have any such remedial effect. There is no indication in the record that there has been any hindrance of free trade. Retroactive application of the "new rules" will simply not effectuate the Commerce Clause goals which the Court sought to achieve in *Armco* to any greater extent than will prospective application. To apply Armco retroactively rather than prospectively would serve only to deplete the State of West Virginia's treasury and would not result in freer trade among the state.

Ashland, of course, takes the position that prospective application is detrimental to the operation of the Commerce Clause, and states that the purpose of the Commerce Clause is to prevent collection of unconstitutional taxes. The historical purpose of the Commerce Clause is, however, to prevent the imposition of trade barriers among the states, and to promote an interstate free trade zone. This purpose is accomplished by constitutionally barring the states from regulating interstate commerce, and charging Congress with this duty and authority. Taxation of

interstate commerce in violation of constitutional limitations is a form of regulation of interstate commerce by the states. Thus, the true "purpose and effect" of this provision is to promote free trade among the states, not merely to bar tax collections.

The final inquiry under *Chevron* is a balancing test, requiring comparison of the hardship or injustice created by a retroactive application against that of prospective application of the new rule of law.

Applying *Armco, supra,* retroactively will not serve the ends of justice and will impose substantial hardship on the State of West Virginia and her taxpayers. The West Virginia gross receipts tax is of long standing. This taxing scheme had been in operation since 1933, remaining substantially the same for fifty years prior to the this Court's decision in *Armco*. The burden of retroactive application of Armco to West Virginia and her resident taxpayers would be brutally heavy, as it would result in revenue loss of approximately Fifty Million Dollars. The State of West Virginia is constitutionally required to maintain a balanced budget and has relied upon the availability of these monies in planning future fiscal policy and formulating budget allocations. Thus, actual fiscal hardships and effects would result from retroactive application of the *Armco* rules without any substantial Commerce Clause benefit.

The payment of these refunds would have a much greater economic impact on the State of West Virginia would than the loss of a windfall refund to the individual manufacturer-wholesalers and their stockholders who stand to benefit from a retroactive application. Obviously, the State would suffer more harm than any single taxpayer could benefit.

It is important to note that, prior to the Armco decision, Ashland did not argue that the wholesale gross receipts tax was discriminatory. *Armco* was certainly recognized by both parties as being significant to the outcome of this proceeding, but solely because of the important nexus questions at issue which this Court ultimately found unnecessary to address. The briefs filed before the Circuit Court of Kanawha County dealt exclusively with the nexus issues. Ashland raised no objection to the assessment based on discriminatory treatment prior to June 12, 1984, the day of the issuance of the Armco decision. As the West Virginia Court expressly recognized, "although Ashland asserts that it raised the Commerce Clause argument from the beginning, it is clear from the record that the real dispute in this case has been nexus." 350 S.E.2d at 537 JS 11A.

In the face of this massive depletion of the public treasury coupled with the reliance the taxpayers and this State have placed on a fifty-year-old statute, the harm to the State of West Virginia, should Armco be applied retroactively, unquestionably outweighs any harm resulting from the loss of lessened tax burdens to Ashland and similarily situated taxpayers, for past years.

This Court has consistently applied decisions prospectively in civil cases involving the public treasurys of state and local governments.

In *Cipriano v. Houma*, 395 U.S. 701, 23 L. Ed. 2d 647, 89 S. Ct. 1897 (1969), a Louisiana law which provided that municipal bonds could be issued only if approved by a majority of "property taxpayers" was struck down because it was in violation of the equal protection clause of the Fourteenth Amendment. The

decision in *Cipriano* was not applied retroactively, so it did not apply to bonds where authorization for issuance had been completed prior to the date of the decision.

In *Lemon v. Kurtzman*, 411 U.S. 192, 36 L. Ed. 2d 151 93 S. Ct. 1463 (1973) (hereinafter "*Lemon II*"), the question was whether to apply the decision in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) (hereinafter "*Lemon I*"), prospectively. *Lemon I* struck down, on First Amendment grounds, a Pennsylvania law which provided for reimbursement of nonpublic sectarian schools for certain educational services as violative of the First Amendment. At stake were twenty-four Million Dollars the schools were to be paid prior to the decision in *Lemon I*. The decision was applied prospectively in *Lemon II* and the schools receive payment:

> 'In short, the propriety of the relief afforded appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circum stances and in light of the general principle that, *absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.*'

[411 U.S. at 208-209, 93 S. Ct. at 1473, 36 L. Ed. 2d at 166.] [Emphasis supplied].

Here, as in *Lemon II*, to compel a state official, the Tax Commissioner, to anticipate a judicial ruling of which he had no inkling until *Armco, supra*, "elevates judicial fiat at the expense of basic principles

of fairness and common sense." See *Ables v. Mooney*, 164 W. Va. 19 (1979) *264 S.E.2d 424, 432.* Indeed, the major distinction between *Ables* and the instant case is the vastly greater amount of public funds at stake in the case at bar.

Likewise, a New Jersey case, *Salorio v. Glaser*, 461 A.2d 1100 (N.J. 1983), closely resembles this one. That case struck down New Jersey's emergency transportation tax because it violated the Privileges and Immunities Clause of the Constitution.

Relying on *Lemon II, supra,* the Court applied the decision prospectively, stating:

> The legislative and executive branches of government have relied on the ETT for many years in preparation of budgets, with respect to both income and expenditures, and in making appropriations and expenditures. The expenditures cannot be undone and reimbursements would have a substantial effect on the State's existing financial requirement. Public fiscal stability is at issue.
>
> Furthermore, no one challenged the ETT until June 1977, fifteen years after the ETT was enacted. * * * It is of considerable moment that the plaintiffs have suffered no financial harm because they have received a credit of the amount paid to New Jersey against their New York income tax. Under these circumstances we believe that reimbursement is not warranted.

461 A.2d 1109-1110.

The aggrieved party subsequently sought review of the decision, but it was denied. *Salorio v. Glaser,*

supra, cert. denied sub nom. Glaser v. Salorio, 464, U.S. 993 (1983).

The reasoning on which these courts relied is equally applicable to the case at bar. All these cases involve new rules or an unforeseen overruling decision in civil cases in which public treasuries of state and local governments are at risk. Where state officials, in good faith performance of their official duties, rely on presumptively valid statutes which are unexpectedly overturned, prospective application is appropriate.

III. THE DECISION BELOW IS NOT RIPE FOR REVIEW BECAUSE IT IS NOT A FINAL JUDGMENT.

The Circuit Court of Kanawha County, granted Ashland's Motion for Summary Judgment based on *Armco*, and, therefore, never addressed Ashland's original argument based on nexus that the business and occupation tax violated the Commerce and Due Process Clauses of the United States Constitution as certain of their operations lacked the requisite nexus. When the West Virginia Supreme Court of Appeals reversed the trial court, it too declined to address the nexus issues remaning the case to the trial court. Obviously, there remain unresolved Federal constitutional questions which may eventually be presented to this Court. It is therefore clear that reviewing this matter on appeal at this point in time is premature and will require piecemeal litigation of Ashland's various theories, any of which could be outcome-determinative.

Taxpayer seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257(2), which provides for review of "final judgments or decrees" only. The opinion

below does not satisfy traditional definitions of finality because it does not "terminate the litigation," as required by *Mower v. Fletcher*, 114 U.S. 127, 128, (1885). "Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review." *Collins v. Miller*, 252 U.S. 364, 371.

Most importantly, the decision below expressly leaves potentially dispositive federal constitutional questions for continued litigation. This Court has held that the mere potential that additional federal questions may arise subsequent to a state court's remand, precludes review:

> This potentiality of additional federal questions arising out of the same controversy has led this Court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here.

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 72, 92 L. Ed. 1212, 68 S. Ct. 972 (1948).

In their Jurisdictional Statement, at pp. 5-8, Ashland at tempts to fit the opinion below into one of the expanded concepts of finality expounded in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). Ashland fails to mention that the threshold requirement of *Cox*, that no substantial federal questions remain unresolved, is unmet in this case. In *Cox*, this Court identified four categories of cases which would be considered final in spite of unresolved proceedings still pending:

> In most, if not all, of the cases in these categories, these additional proceedings would

> not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' [citation omitted], as well as precipitate interference with state litigation. * * *

420 U.S. at 477-478.

The instant Jurisdictional Statement at page 7, implies that Ashland has no chance of prevailing in the West Virginia Courts on the nexus issues and that this Court will have a later opportunity to address the issues for which review is presently sought, which will insure that Petitioners get their "day in court." Nothing in the policies of finality embodied in *Cox* or its predecessors allows Petitioners two days in Court. To so allow would unnecessarily congest this Court's docket, needlessly interfere with orderly State proceedings, and, should Respondents prevail, delay the ultimate resolution of the controversy below.

Ashland also maintains that finality is satisfied under the *Cox* category for review of cases in which there is risk of erosion of federal policy. This doctrine has been expressly limited, however. *See Flynt v. Ohio*, 451 U.S. 619 (1981). The reasoning suggested by the Ashland would expand the construction of this category far beyond that originally intended. Especially where, as here, the resolution of the prospectivity issue can await review without adverse effect while the remaining constitutional questions are resolved. The *Cox* categories are not to be allowed to "swallow the rule" of finality.

CONCLUSION

Counsel for the appellee, Michael E. Caryl, West Virginia State Tax Commissioner, respectfully submits that jurisdiction does not lie here under 28 U.S.C. 1257(2); that the decision below is not ripe for review; that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate nonfederal basis; and, that this Court should dismiss this appeal and affirm the decision below.

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No. 86-1295

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ASHLAND OIL, INC.,
Appellant,
v.
HERSCHEL H. ROSE, III,
STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee.

On Appeal from the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Attorney for the Appellant has been obtained. The consent of the Attorney for the Appellee was requested and refused.

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 41 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 258 corporate members which conduct a substantial portion of the interstate commerce of United

States taxpayers. One of COST's principal activities has been to work with the states and others toward developing fair and equitable standards of state taxation. Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as this one which deprive taxpayers of the constitutional guarantees of due process and equal protection under the Fourteenth Amendment.

In this case, West Virginia seeks to give prospective effect only to this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), invalidating the state's wholesale gross receipts tax as unconstitutionally discriminatory under the Commerce Clause. Thus, the State seeks to retain the discriminatory taxes assessed and collected prior to this Court's *Armco* decision, except as to the taxpayer therein, thereby reaping the benefits of those revenues collected under the unconstitutional law. A substantial number of COST members are among those taxpayers which are adversely affected by the prospective ruling of the court below since the right to recovery of these illegally-exacted taxes pursuant to the refund statute provided by the state legislature is effectively extinguished. If permitted to stand, the finding of unconstitutional state taxation by this Court in *Armco* would thus become meaningless as to these many taxpayers.

Furthermore, an increasing number of states in recent years have determined that judicial decisions invalidating unconstitutional state taxes should be applied prospectively. In *First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985), the Oklahoma Supreme Court applied its decision invalidating the state bank tax as unconstitutional under *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), prospectively only from January 24, 1983, the date of this Court's decision.

In *Midland Bank & Trust Co. v. Olsen*, 717 S.W.2d 580 (Tn. 1986), the issue of prospective/retrospective application arose when the Commissioner of Revenue "implie[d], without presenting any argument or authority," 717 S.W.2d at 583, that allowing the refund of the taxpayers' 1982 corporate excise taxes required retroactive application of the *Memphis Bank* decision. The court held, however, that the refunds mandated by *Memphis Bank* did not involve the retrospective application of that decision since the taxpayers' cause of action did not accrue until the 1982 taxes were due and paid under protest which occurred after the decision was rendered. The issue of retroactive application of this Court's *Memphis Bank* decision for tax years earlier than 1982 was expressly reserved by the Tennessee Supreme Court.

In another instance where an unconstitutional taxing scheme was found under this Court's *Memphis Bank* decision, the state and the city differ in their application of the state court of appeals decision. The City of New York has taken the position that the decision in *Matter of Forbes, Inc. v. Department of Finance*, 487 N.E. 2d 252 (N.Y. Ct. App. 1985), *cert. denied*, —— U.S. —— (Apr. 7, 1986) (No. 85-1371), invalidating the city's treatment of federal government obligations for general corporation tax purposes as discriminatory and unconstitutional, is to be applied prospectively from November 19, 1985, the date of the court of appeals decision. The State of New York, however, has announced its past policy of allowing refund claims for all open years.

Prospective effect which a North Dakota district court gave to its ruling as of the date of the recording of judgment was affirmed on appeal in *Metropolitan Life Insurance Co. v. Commissioner*, 373 N.W.2d 399 (N.D. 1985) in a case brought by several out-of-state insurance companies. Thus, while the taxpayers were successful in their challenge of the state's gross insurance premiums tax as unconstitutionally discriminatory under this

Court's decision in *Metropolitan Life Insurance Co. v. Ward*, 105 S. Ct. 1676 (1985), the prospective ruling effectively denied their claims for refund.

The issue of prospectivity has also been raised in a "test case" before this Court, *National Can Corporation v. State of Washington, Department of Revenue*, No. 85-2006, in which the Appellant interstate businesses are representative of more than 100 taxpayers engaging in interstate commerce who filed substantially similar actions in reliance upon this Court's decision in *Armco*. The Washington Department of Revenue has asked the Court, if its ruling is adverse to the State, to apply its decision prospectively in order to extinquish the taxpayers' rights to refunds. Brief for Appellee at 44-46.

Other states—including Ohio, New Jersey, Kentucky, New York, Florida and Arizona—have also denied refunds to taxpayers by giving a decisional state or local tax rule prospective operation only. *See OAMCO v. Lindley*, 27 Ohio St. 3d —— (1986), *aff'd on rehearing*, 27 Ohio St. 3d —— (1987); *Salorio v. Glaser*, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983); *Jacobs v. Lexington-Fayette Urban County Government*, 560 S.W.2d 10 (Ky. 1977); *Pellnat v. City of Buffalo*, 59 A.D.2d 1938, 399 N.Y.S.2d 788 (1977); *Hurd v. City of Buffalo*, 41 A.D.2d 402, 343 N.Y.S.2d 950 (1973), *aff'd*, 34 N.Y. 2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974); *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973); *Southern Pacific Co. v. Cochise County*, 377 P.2d 770 (1963).

Until recently, the states and taxpayers alike have generally recognized the taxpayer's right to a refund or abatement of unconstitutionally exacted taxes. There is an emerging trend by some states to apply a judicial decision of unconstitutional state taxation only on a prospective basis, thereby allowing them to retain the financial benefit of the revenues collected under the unconstitutional law. However, it has long been established

that "[t]he retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of tax in the first instance. *See, Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S. Ct. 121, 123, 74 L.Ed. 478 (1930)." *United States v. State Tax Commission of Mississippi*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981). The purpose and effect of the rule of prospectivity adopted by the West Virginia Supreme Court is to deny the Appellant Ashland and all other taxpayers the remedy to which they are constitutionally entitled.

By this motion, COST seeks leave to show that this Court's decision in *Armco, Inc. v. Hardesty*, holding the West Virginia wholesale gross receipts tax to be unconstitutional, should apply retrospectively to prevent inequity and protect the constitutional rights of interstate corporate taxpayers.

COST therefore urges that leave be granted to file a brief as *amicus curiae* and respectfully so moves the Court.

Respectfully submitted,

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of Appellant's Jurisdictional Statement in the above-captioned case.

INTEREST OF *AMICUS CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae.*

SUMMARY OF ARGUMENT

This Court's decision in *Armco, Inc. v. Hardesty*, holding the West Virginia wholesale gross receipts tax to be unconstitutional, should apply retrospectively to prevent inequitable treatment as to all interstate corporate taxpayers.

ARGUMENT

The rule of limited retrospectivity that a change in law must, at a minimum, be given effect while a case is pending on direct review was established in *United States v. The Schooner Peggy*, 1 Cranch 103 (1801). While this principle was applied in *Schooner Peggy* where the intervening change in law involved a treaty, this same approach has been applied in cases where a change in law is made by statute, *Bradley v. School Board*, 416 U.S. 602 (1960); *United States v. Alabama*, 362 U.S. 602 (1960) (per curiam); *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943); *Carpenter v. Wabash Ry.*, 309 U.S. 23 (1940); by Constitutional amendment, *United States v. Chambers*, 291 U.S. 217 (1934); by judicial decision, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Moores v. National Bank*, 104 U.S. 625 (1882); and where the change in law is "constitutional, statutory or judicial", *Thorpe v. Housing Authority*, 393 U.S. 268, 282 (1969).

The rule of *Schooner Peggy* was noted as being applicable in both civil and criminal litigation in *Linkletter v. Walker*, 381 U.S. 618 (1965) when this Court adopted the first of its modern retroactivity tests for cases involving application of new constitutional rules. The three-prong test established therein applied to criminal litigation and required a "weigh[ing] of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

A separate standard for governing questions of retroactive application of new rules of law in civil cases was enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Three factors were established as relevant in determining whether a decision should have nonretrospective effect:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation. . . . Finally, we have weighed the inequity imposed by retroactive application for where a decision of this court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." (Citations omitted). 404 U.S. at 106-107.

Application of the retrospective standards of *Linkletter* generated incompatible rules and inconsistent principles and thus in *Griffith v. Kentucky*, 57 U.S.L.W. 4089 (U.S.L.W. Jan. 13, 1987), this Court adopted Justice Harlan's approach to retroactivity propounded in *Desist v. United States*, 394 U.S. 244, 256 (1969) (dissenting opinion) and in *Mackey v. United States*, 401 U.S. 667, 675 (1971). The Court held in *Griffith* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final with no exception for cases in which the new rule constitutes a 'clear break' with the past." 55 U.S.L.W. at 4092. Thus, the Court has abandoned its efforts, at least in the area of criminal litigation, to deviate from the established principle under the *Schooner Peggy* line of cases that new rules of law should be applied retroactively to non-final cases.

While it was noted in *Griffith* that the area of civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*," 55 U.S.L.W. at 4091, n.8, the rationale for eliminating deviating retrospective rules applies equally here. This Court rejected any exception for a new rule which is a clear break with the past for the same reasons that failure to apply a newly-declared rule to non-final cases violates basic norms of constitutional adjudication:

> "First, it is a settled principle that this Court adjudicates only 'cases' and 'controversies'. *See* U.S. Const. Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of the judicial review requires that we apply the rule to all similar cases pending on direct review."
>
> • • • •
>
> "Second, selective application of new rules violates the principle of treating similarly situated defendants the same." 55 U.S.L.W. at 4091.

Indeed, Justice Harlan cautioned the Court in *United States v. Estate of Donnelly*, 397 U.S. 286 (1970) that certain distinctions suggested in civil cases, such as between clear and ambiguous statutes, decisions construing statutes for the first time, decisions overruling prior constructions of statutes, may lead the Court to a "retroactivity quagmire" similar to that which it has escaped in the criminal field. 397 U.S. at 295. In Justice Harlan's view, new rules of law should be applied retrospectively also in non-final civil cases, there being no justification for applying principles, constitutional or otherwise, determined to be wrong to litigants who are or may still come to court. Consistent with his approach to criminal retroactivity adopted by this Court in *Griffith*, "the un-

derlying substantive principle [is] that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them." 397 U.S. at 297. Perhaps, it is again that time called for by Justice Harlan when " 'Retroactivity' must be rethought." 55 U.S.L.W. at 4091. The instant case provides the Court that opportunity.

CONCLUSION

For the foregoing reasons, COST urges this Court to note probable jurisdiction in the present case and give plenary consideration to the questions discussed in Appellant's Jurisdictional Statement.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellant Ashland Oil, Inc. ("Ashland") submits this brief in opposition to Appellee's Motion to Dismiss or Affirm ("Appellee's Motion"). To the extent that Appellee's Motion raises questions that were not addressed in Ashland's Jurisdictional Statement or that require clarification, those questions are discussed below in the order in which they are presented in Appellee's Motion.[1]

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1 Ashland states pursuant to Rule 28.1 that the Designation of Corporate Relationships filed as Appendix G to Ashland's Jurisdictional Statement is currently accurate.

APPELLEE'S JURISDICTIONAL ARGUMENT

As a threshold matter, Appellee maintains that "[t]he lower court did not uphold a state statute in the face of a constitutional challenge, and this appeal is not within the jurisdiction of 28 U.S.C. § 1257(2). Accordingly, this appeal should be dismissed." Appellee's Motion at 3. A brief review of the jurisdictional statutes and the facts underlying this appeal shows these contentions to be far off the mark.

This Court has appellate jurisdiction to review a final judgment rendered by the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." 28 U.S.C. § 1257(2) (1982). Both of these requirements are satisfied here.

In the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court") Ashland maintained that the West Virginia wholesale business and occupation tax at issue could not be collected from it because the taxing statute violated the Commerce Clause. It is difficult to imagine how one could more directly draw into question the validity of a state statute on the ground of its being repugnant to the Constitution.

Appellee apparently is of the view that the constitutional validity of the West Virginia statute was not drawn into question within the meaning of 28 U.S.C. § 1257(2) because the decision of the West Virginia Supreme Court was based on retroactivity grounds. Appellee's Motion at 3. However, the basis of the West Virginia Supreme Court's decision is beside the point. The focus of the first requirement of 28 U.S.C. § 1257(2) is the issue that was presented for decision, and Ashland's contention throughout the proceedings in West Virginia was based upon the constitutional invalidity of the West Virginia taxing statute. Under Appellee's view, this Court would never possess appellate juris-

diction under 28 U.S.C. § 1257(2) to review a case presenting solely a retroactivity question, a view at odds with precedent. *See, e.g., Lemon v. Kurtzman*, 411 U.S. 192 (1973) (appeal granted to determine retroactive application of a prior decision invalidating a state statute on constitutional grounds).

The second requirement of 28 U.S.C. § 1257(2)—that the appealed decision be in favor of validity of the state statute—has also been met here. The sole result of the decision below was to uphold the very state statute of which Ashland complained against Ashland's constitutional claim. Consequently, one cannot avoid the conclusion that the decision below in fact upheld the validity of the state statute in question. As stated by this Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 at 441 (1979):

> We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.

In the present case, although the West Virginia Supreme Court acknowledged that the taxing statute at issue had been held unconstitutional by this Court in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), it nevertheless concluded that the tax imposed by the statute could be collected from Ashland. The West Virginia Supreme Court thus held the West Virginia taxing statute applicable to the particular set of facts presented herein, against Ashland's contention that the statute could not be applied because it violated the Commerce Clause. This Court accordingly has jurisdiction to hear this appeal.[2]

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2 Even if it could be concluded that an appeal does not lie under 28 U.S.C. § 1257(2) because Ashland did not challenge the validity of a state statute as being repugnant to the Constitution, or because the decision below was not in favor of validity of the statute at issue, Ashland's Jurisdictional Statement should be treated, pursuant to 28 U.S.C. § 2103, as a petition for certiorari under 28 U.S.C. § 1257(3), and the petition should be granted. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562-63 n.4 (1980); *Addington v. Texas*, 441 U.S. 418, 422-23 (1979).

APPELLEE'S STATE LAW ARGUMENT

After the decision of this Court in the *Armco* case, on July 6, 1984 the Tax Commissioner of the State of West Virginia filed a Petition for Rehearing which asked the Court "to clarify its Opinion of June 12, 1984 by directing that its decision herein be applied prospectively to all taxpayers, with the exception of appellant Armco." Petition for Rehearing at 1-2, *Armco* (No. 83-297). Alternatively, the Petition requested that, should additional facts be necessary to resolve the retroactivity issue, the case be remanded to the courts of West Virginia for resolution of that issue. *Id.* at 18-18b. On August 9, 1984, this Court entered an order requesting that Armco file a response to the Petition for Rehearing, and Armco's response, urging the Court to resolve the retroactivity issue, was filed on September 7, 1984. Appellant's Response to Appellee's Petition for Rehearing, *Armco* (No. 83-297). On October 9, 1984, the Petition for Rehearing was denied. *Armco Inc. v. Hardesty*, 467 U.S. 638, *reh. denied*, 469 U.S. 912 (1984) (Justice Powell, the author of the majority opinion in *Armco*, noting that he would grant the Petition).

From the events recited in the preceding paragraph Appellee inexplicably concludes that in this case the West Virginia Supreme Court "properly interpreted that resolution of the prospectivity question had been referred to it by this Court." Appellee's Motion at 6. Ashland suggests that the most likely ground for denial of the Petition for Rehearing in *Armco* was the lack of a case or controversy between the parties before the Court with respect to retroactivity. But be that as it may, the simple denial of the Petition cannot rationally be interpreted as a referral by this Court of the retroactivity issue to the West Virginia Supreme Court.

In support of the referral theory Appellee relies on the decisions of this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); and *Williams v. Vermont*, 472

U.S. 14 (1985). Such reliance is misplaced. In *Bacchus* a state taxing statute was attacked by taxpayers as unconstitutional, and the taxpayers claimed refunds of taxes paid. The highest court of the state determined that the statute was valid, and that court accordingly did not have occasion to consider the claims for refund of the tax. This Court reversed the state court, holding the statute at issue to be in violation of the Constitution. In considering the state's argument that the refunds claimed should not be granted, even though the statute pursuant to which the taxes had been collected was unconstitutional, this Court in *Bacchus* stated:

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law.[14] Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore, to address them in the first instance. Accordingly, we reverse the judgment of the Supreme Court of Hawaii and remand for further proceedings not inconsistent with this opinion.
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> 14 It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law.

468 U.S. at 277.

Thus, *Bacchus* merely stands for the proposition that this Court may be reluctant to consider remedial issues preliminary to a full consideration of them in the court below, particularly where the disposition of the issues by the court below may render moot any potential constitutional issues. If, after full consideration of these issues by the state courts, it is determined that no refund of the tax is permissible under state law,

that would raise an issue of constitutional dimensions which would be ripe at that time for this Court's review.[3]

None of the factors which moved this Court to remand *Bacchus* to the state court are present here. The sole issue presented by this appeal is whether the State of West Virginia may affirmatively invoke its processes to collect an unconstitutional tax. Equally important, this question was fully briefed and argued in the West Virginia Supreme Court, and that court specifically decided the retroactivity question. Ashland therefore has no further recourse in the State of West Virginia with respect to the question presented herein, and this question is therefore ripe for this Court's review at this time.[4]

APPELLEE'S FINALITY ARGUMENT

Appellee advances two principal points in support of its contention that the decision below should not be considered final for purposes of 28 U.S.C. § 1257(2). First, Appellee maintains that *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), establishes a "threshold requirement" that no federal questions remain to be decided before a decision will be considered final. Appellee's Motion at 24. And second, Appellee maintains that Ashland is asking for "two

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3 Indeed, this Court has held that "a denial by a state court of a recovery of taxes enacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). *See also Ward v. Board of County Comm'rs.*, 253 U.S. 17, 24 (1920) ("[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take . . . property . . . arbitrarily and without due process of law.")

4 For basically the same reasons that *Bacchus* is inapposite here, so are *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) and *Williams v. Vermont*, 472 U.S. 14 (1985). In *Hooper*, this Court remanded a case without deciding whether a refund was appropriate where it was determined that a state taxing statute was unconstitutional after the state court had sustained the statute. In *Williams*, the state court had dismissed a taxpayer's assertion that a tax was unconstitutional on the ground that the taxpayer's pleadings had failed to state a claim. This Court reversed and remanded for consideration of the substantive merits of the taxpayer's claims.

days in Court" and that resolution of the issue presented in this case can be postponed "without adverse effect". *Id.* at 25.

Appellee's suggestion that the *Cox* finality analysis requires that no further federal questions remain to be decided in the state courts is simply wrong. Although it was noted in *Cox* that in most cases in which the pragmatic approach to finality had been adopted no other federal questions remained for decision in the state courts (420 U.S. at 477-78), this Court did not characterize the absence of other federal issues as a requirement of finality. On the contrary, the cases cited in *Cox* in connection with this comment indicate that this Court was referring to cases in which the additional federal issue remaining for decision in the state courts is inextricably interwoven with the federal question raised on appeal. Thus, the Court in *Cox* stated:

> Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later. "For in those cases the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973).

420 U.S. at 477-78 n.6.

Moreover, the *Cox* decision itself cites with approval (420 U.S. at 483) *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963), a case in which a federal issue would have been preserved for appeal to this Court after completion of further state court proceedings, but finality was nevertheless found to be present. Clearly, this Court in *Cox* did not intend to preclude a finding of finality solely on the ground that federal claims which are factually and legally unrelated to the issue appealed are pending in the courts below.

In the present case the federal question pending in the West Virginia courts (*i.e.*, the nexus question) will be rendered moot if this Court determines that its decision in the *Armco* case precludes collection of the tax involved here. Moreover, a resolution of the retroactivity issue presented in this appeal is neither factually nor legally related to the nexus question. Thus, this appeal does not present merely a part of an integral question, and the pendency of the nexus question in the West Virginia courts therefore should not affect the conclusion that the decision of the West Virginia Supreme Court in this action was final for purposes of 28 U.S.C. § 1257.

Finally, Appellee's suggestions that Ashland is seeking "two days in Court" and that a resolution of the issue presented here may be postponed "without adverse effect" (Appellee's Motion at 25) are relevant only if one assumes the outcome of the remaining state proceedings. However, if this Court refuses to hear Ashland's appeal at this time, and Ashland is successful in asserting its nexus argument in the West Virginia Supreme Court, there will be no opportunity for this Court to review the retroactivity decision handed down by the West Virginia Supreme Court. This unfortunate precedent would thus stand immune from review by this Court.

This Court has held that the possibility of effectively immunizing a state court decision from review is itself sufficient cause for attributing finality to the decision. In fact, in *Cox*, this Court based its determination of finality on these grounds, stating:

> [The appellants] may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all. Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First

> Amendment claim until after trial will "leave unanswered . . . an important question of freedom of the press under the First Amendment," "an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends. Given these factors—that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

420 U.S. at 485-86 (citations and footnote references omitted).

Precisely the same situation is presented here. If this Court refuses to hear this appeal, Ashland will be forced to invest substantial time and expense in defending against the imposition of this tax on nexus grounds in the West Virginia courts, despite the fact that this Court has already determined the taxing statute to be unconstitutional. But if the West Virginia Supreme Court erroneously held the taxing statute applicable to Ashland, as this Court noted in *Cox*, there should not be a trial at all. Moreover, again as in *Cox*, even if Ashland is successful in resisting the tax on nexus grounds in the West Virginia courts, there will remain in effect the unreviewed decision of the Supreme Court of West Virginia refusing to apply a constitutional decision of this Court under circumstances which cannot fairly be distinguished from those passed upon in this Court's decision in the *Armco* case. Accordingly, the decision of the West Virginia Supreme Court should be considered final for purposes of 28 U.S.C. § 1257.

CONCLUSION

For the foregoing reasons, Appellee's Motion to Dismiss or Affirm should be denied, and this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Dated: April 15, 1987

Respectfully Submitted,

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